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No._____

IN THE

Supreme Court of the United States

DARRIS ALARIC WARE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari To The Maryland Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below improperly concluded that the error of allowing evidence of Darris Ware's post-*Miranda* silence was harmless beyond a reasonable doubt.

PARTIES TO THE PROCEEDINGS

This matter involves no entities required to be identified under Rule 29.6.

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No._____

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DARRIS ALARIC WARE,

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v.

STATE OF MARYLAND,

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On Petition for a Writ of Certiorari
To The Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Darris Alaric Ware hereby petitions for a writ of certiorari to review the judgment of the Maryland Court of Special Appeals in this case, following the denial of Mr. Ware's petition for a writ of certiorari to the Maryland Court of Appeals.

OPINIONS AND ORDERS BELOW

The opinion of the Maryland Court of Special Appeals (App. 1a-40a, including the mandate) is reported at 170 Md. App. 1, 906 A.2d 969 (2006). The order of the Maryland Court of Appeals denying Petitioner's petition for a writ of certiorari (App. 1b) is reported at 912 A.2d 649 (Md. 2006).

JURISDICTION

The Maryland Court of Appeals denied Petitioner's petition for a writ of certiorari on December 15, 2006. This Court has jurisdiction to review on certiorari the Maryland Court of Special Appeals' judgment, following the Court of Appeals' denial of the petition for a writ of certiorari, pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution is reproduced at App. 1g.

STATEMENT OF THE CASE

The judgment of the Maryland Court of Special Appeals in this case blatantly denied Darris Ware his right to be tried without his own silence being offered to condemn him. The Court of Special Appeals ruled that the improper admission of the evidence of Mr. Ware's protected Fifth Amendment silence in response to a question regarding the location of his gun was harmless beyond a reasonable doubt. However, the other evidence against Mr. Ware was far from strong, and the prosecution not only argued in favor of introducing Mr. Ware's silence over defense counsel's objection, it relied critically upon Mr. Ware's silence as evidence of his guilt during closing arguments.

Procedural History

The trial that underlies this Petition was not the first instance in which the State of Maryland denied Mr. Ware his right to a fair trial. Faced with weak evidence, the prosecution withheld favorable evidence in Mr. Ware's first trial, ultimately leading to a reversal of Mr. Ware's

conviction by the Maryland Court of Appeals. *Ware v. State (Ware I)* 348 Md. 19, 702 A.2d 699 (1997) (App. 1c-54c). Mr. Ware was tried again and was convicted of two counts of first-degree murder and two counts of use of a handgun in the commission of a felony, receiving a sentence of death for the murders, and two consecutive ten-year sentences for the use of a handgun. Mr. Ware appealed, and the Maryland Court of Appeals affirmed. *Ware v. State (Ware II)*, 360 Md. 650, 759 A.2d 764 (2000), *cert. denied*, 531 U.S. 1115 (2001) (App. 1d-75d).

On or before November 1, 2001, Mr. Ware filed a motion for post conviction relief, which the Circuit Court for Anne Arundel County granted in part on two grounds on June 28, 2002. The Circuit Court found that in *Ware II* Mr. Ware received ineffective assistance of appellate counsel because his attorney failed to raise the issue of the trial court allowing the prosecution to introduce, over objection by defense counsel, evidence of Mr. Ware's post-*Miranda* silence. Consequently, the court granted Mr. Ware a "belated appeal" on this issue. *Ware v. State*, No. K-98-1096 (Circuit Court for Anne Arundel County) (mem.) (App. 1e-27e). The Circuit Court also found that Mr. Ware received ineffective assistance of counsel during his 1999 sentencing, and the court granted Mr. Ware a new sentencing hearing. The State applied, and Mr. Ware cross applied, for leave to appeal the Circuit Court's grant in part and denial in part of post conviction relief. The Court of Appeals denied the parties' applications for leave to appeal, indicating that the belated appeal granted by the Circuit Court would be heard along with any appeal from the new sentencing. *State v. Ware (Ware III)*, 373 Md. 550, 819 A.2d 1030 (2002) (App. 1f-2f).

On October 14, 2004, Mr. Ware was sentenced to life without parole. Mr. Ware appealed both his 1999 conviction and his 2004 sentencing in accordance with the Circuit

Court's grant of a belated appeal. The Court of Special Appeals affirmed the conviction and the sentencing in an opinion filed on September 7, 2006 and via a mandate issued on October 10, 2006 (App. 1a-40a). The Maryland Court of Appeals denied Mr. Ware's petition for a writ of certiorari on December 15, 2006 (App. 1b-2b).

Evidence of Mr. Ware's Silence

The court below recounted the relevant facts, including those related to Mr. Ware's silence (App. 4a-12a): On December 30, 1993, Kristi Gentry[1] and Cynthia Allen, both acquaintances of Mr. Ware, were found shot in Ms. Gentry's home. Mr. Ware called Ms. Gentry's residence on the afternoon of December 30, 1993, and Officer Knight[2] spoke with him on the phone. At Officer Knight's request, Mr. Ware went to Ms. Gentry's home where he was immediately arrested.

After his arrest, Mr. Ware signed an advisement-of-rights form indicating that he was willing to speak to detectives without an attorney. Immediately after signing the advisement-of-rights form, three detectives and one sergeant, including Detective Michael Praley, interrogated Mr. Ware from approximately 6:21 p.m. until 1:58 a.m. During that extended period of questioning, Mr. Ware did not confess to murdering Ms. Gentry and Ms. Allen. Nevertheless, the State prosecuted Mr. Ware, and alleged that he used his gun to commit these murders.

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[1] Kristi Gentry's full name was Bettina Kristi Gentry, but she went by Kristi. It appears that her name was misspelled in the 1999 transcript as "Christie." App. 2d, n.3.

[2] Officer Knight did not provide his first name at trial.

At Mr. Ware's 1999 trial, the prosecution questioned Detective Praley about his interrogation of Mr. Ware. In the prosecution's questioning of Detective Praley, the following exchange occurred:

Q: Did you ask him where you could find the gun?

A: It was asked. *I didn't get a response.*

(emphasis added).

Defense counsel objected to this recitation of the questioning of Mr. Ware and Detective Praley's statement concerning Mr. Ware's silence. A bench conference followed, and the prosecution insisted on the admissibility of Mr. Ware's silence. The court was informed that Mr. Ware remained silent in response to certain police questioning, but that he answered some questions, including questions posed subsequent to his remaining silent. The court determined that under those circumstances Mr. Ware had fully and irrevocably waived his right to remain silent. The court stated that the defense was wrong to think that "because he chooses not to answer a damning question, that he is now re-invoking his silence." However, the State presented no evidence that Mr. Ware's silence was anything other than an invocation of his right to remain silent. Moreover, the court failed to make any finding that Mr. Ware was not relying on his right to remain silent in refusing to answer.

The use at trial of Mr. Ware's post-arrest, post-*Miranda* silence did not end with the prosecution's successful attempt to introduce that silence into evidence. In closing argument, the prosecutor contended that Mr. Ware's silence was evidence of his guilt. The prosecutor argued that Mr. Ware's silence showed that he used his gun, which police never located, to commit the murders:

> MS. ROGERS: ... [Defense Counsel] told you, in his opening statement, that his client is innocent. Completely innocent. *Well, ladies and gentlemen, where is the innocent man's gun? The police asked him that very question, and he doesn't answer.*
>
> The police searched his Jeep. It is not there. The police looked behind the speaker in his apartment. In fact, they looked everywhere in that apartment, and that gun is nowhere to be found, ladies and gentlemen.
>
> There is only one reason that the Defendant's gun is nowhere to be found after these murders, and it is not a coincidence. The Defendant used his .380 Davis handgun to murder...and then got rid of the murder weapon so that he wouldn't be tied to the murders he had just committed.

(emphasis added).

Non-Silence Evidence

Although the State presented some evidence against Mr. Ware, the prosecution presented no physical evidence linking Mr. Ware to the crimes, the State's key witness was a convicted murderer and impeached on several grounds, and the State presented no affirmative evidence concerning the murder weapon.

The Maryland Court of Appeals in *Ware II* set forth the non-silence evidence in Mr. Ware's case as follows (App. 2d-5d): Mr. Ware dated Ms. Gentry starting in 1991, and had moved into the home of Ms. Gentry's mother to live with Ms.

Gentry in August 1993. By September the relationship had become strained and Mr. Ware moved out. Ms. Gentry's friend, Adrian Washington, testified that he called Ms. Gentry at 9:00 a.m. on the day she was killed, and that Ms. Gentry sounded scared. Adrian Washington also testified that an angry male caller (later identified as Mr. Ware) telephoned him and asked Mr. Washington not to call the house again. Thereafter, Adrian Washington received a call from Ms. Gentry, and Mr. Washington testified that he heard Ms. Gentry say "Darris, I can't breathe. Get off me. You're hurting me." Then, Adrian Washington called his brother, Thomas Washington, who called Ms. Gentry's house and spoke to Mr. Ware. The two argued, and Mr. Ware asked Thomas Washington whether he "was bulletproof" and stated a desire to "get [him] and [his] punk-ass brother."

Then, at about 10:00 a.m., Thomas Washington called Ms. Gentry's brother, Kevin Gentry. Mr. Gentry drove to his mother's house and beat Mr. Ware. Mr. Gentry testified at trial that Mr. Ware had pointed a gun at him and threatened to kill him, after which Mr. Ware drove away. As Mr. Gentry was leaving, he happened upon Mr. Ware returning to the house when, according to Mr. Gentry's testimony, Mr. Ware stopped and displayed a gun. Mr. Gentry attempted to drive over Mr. Ware, however Petitioner escaped and Mr. Gentry left the scene to return to work.

Although evidence indicated that Mr. Ware had displayed his gun in the dispute with Mr. Gentry on December 30, 1993, the police did not locate any gun that matched the bullets used to kill Ms. Gentry and Ms. Allen. The prosecution's evidence regarding Mr. Ware's gun (aside from the evidence of his post-*Miranda* silence noted above) was that Mr. Ware, by his own admission, had owned a gun of the caliber used to kill Ms. Gentry and Ms. Allen. Further, an employee at a shooting range and sporting goods store

told police that she saw Mr. Ware at the store around noon on December 30, 1993, and the store manager testified that a box of .380 caliber ammunition of the type and make apparently used by Ms. Gentry and Ms. Allen's killer was sold at his store at about 12:10 p.m.

The State also presented testimony by Edward Anderson, an inmate at the Department of Corrections, who testified that he called the Gentry home on December 30, 1993 at about noon. Mr. Anderson stated that during that call Ms. Allen told him that Mr. Ware was in the house. Mr. Anderson further testified that he then heard Ms. Gentry screaming and then three gunshots followed by someone hanging up the phone.

At trial, however, Mr. Anderson was substantially impeached on the following grounds (App. 3h-13h): (1) from 1989 through the time of his testimony at Mr. Ware's 1999 trial, Mr. Anderson was serving a sentence of life imprisonment for first-degree, felony murder; (2) after his arrest related to his first-degree murder charge, Mr. Anderson twice lied to police officers in written statements; and (3) Mr. Anderson had moved to have his sentence modified, and he asked that his sentencing court consider his planned testimony in Mr. Ware's case in determining whether to reduce Mr. Anderson's sentence.

The Opinion Of The Maryland Court of Special Appeals

Mr. Ware appealed, arguing that the trial court committed error by admitting the evidence of Mr. Ware's silence in response to police questioning concerning the location of his gun, and that because this silence evidence was the only compelling evidence that Mr. Ware's gun was the murder weapon and the prosecution relied upon Mr. Ware's silence as evidence of guilt during its closing argument, the error

was not harmless.[3] App. 16a-17a. The Maryland Court of Special Appeals held that the trial court committed error, but that the error was harmless, in an opinion filed January 28, 2004. App. 1a-38a.

The court first considered whether defense counsel properly preserved the issue of the inadmissibility of Mr. Ware's silence in response to a question about the location of his gun. The court stated that, because defense counsel objected almost immediately after Mr. Ware's silence was introduced and raised the same arguments Mr. Ware raised on appeal, "[w]e easily conclude that, with respect to the gun, the issue as to the admissibility of appellant's selective silence is preserved for our review." App. 22a.

The court then recounted much of the long history of silence evidence cases in Maryland, ultimately concluding that Mr. Ware's non-response to police interrogation concerning the location of his gun was silence protected by the Fifth Amendment. The Court stated that "[a]s appellant asserts in his reply brief, 'non-responses during custodial interrogation are clearly and precisely what the courts of the United States and Maryland consistently protect.'" App. 30a.

The court then analyzed whether the error of admitting Mr. Ware's silence was harmless beyond a reasonable doubt. App. 30a-33a. The court focused primarily on the non-

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[3] Mr. Ware also argued that the trial court erred by admitting evidence of Mr. Ware's silence in response to the suggestive comment by police that "we could be compassionate and understand how this could occur," and by failing to obtain a new pre-sentence investigation report. App. 7a, 33a. The court held that the admissibility of Mr. Ware's silence in response to the "compassionate and understand" comment was not preserved and that Maryland statutory law does not require new pre-sentence investigation reports for re-sentencing hearings, and Mr. Ware is not asking this Court to consider those issues. App. 21a, 36a-37a.

silence evidence discussed above, and referred to that evidence as "damning," even if circumstantial. App. 30a-31a. At trial, Mr. Ware had challenged a key piece of evidence for the State – the testimony of Edward Anderson, an inmate in prison who alleged that he was on the phone with one of the victims, heard the victim identify Mr. Ware, and then heard gunshots. App. 31a. Although Mr. Anderson was impeached on several grounds, including that Mr. Anderson is a convicted murderer and was using his testimony to try to have his sentence reduced (App. 3h-13h), the court dismissed the possibility that the impeachment of Mr. Anderson reduced the overwhelming nature of the evidence in Mr. Ware's case. The court simply stated that "the jury was entitled to credit Anderson's testimony." App. 32a.

The court also concluded that the evidence of Mr. Ware's silence was merely cumulative, stating that if "the court barred admission of appellant's silence as to the location of the gun, that would not have made the gun's absence any less conspicuous." App. 33a. The court continued: "The prosecutor's statement in closing arguments that appellant 'doesn't answer' when asked about the location of the gun was cumulative, because the jury was presented with admissible evidence that appellant owned a gun and the police could not find it, despite their efforts to locate it." App. 33a.

REASONS FOR GRANTING THE PETITION

I. The Court Below Improperly Weighed the Non-Silence Evidence in Mr. Ware's Case.

In order to properly conclude that a violation of a defendant's post-*Miranda* right to silence was harmless beyond a reasonable doubt, a court must conclude that the evidence in no way influenced the verdict. *Brown v. United*

States, 411 U.S. 223 (1973); *Milton v. Wainwright*, 407 U.S. 371 (1972). A court can only reach such a conclusion when, upon a thorough and independent review of the record evidence, it determines that the non-silence evidence was overwhelming, *and* that the impact of the silence evidence was negligible because it was cumulative of other properly admitted evidence. *Harrington v. California*, 395 U.S. 250, 254 (1969) (stating that a determination of whether an error is harmless beyond a reasonable doubt is to be based on an independent "reading of the record and on what seems...to have been the probable impact of the [tainted evidence] on the minds of an average jury").

A. The Evidence Against Mr. Ware Was Not Overwhelming.

In Mr. Ware's case, the evidence was far from strong. Yet, the court below failed to properly assess the true weight of the evidence.

The State's evidence against Mr. Ware showed little more than that two women had been murdered, and that Mr. Ware knew those women and was a possible suspect. In reversing Mr. Ware's conviction following his first trial in which the prosecution withheld favorable evidence, the Maryland Court of Appeals acknowledged that the evidence against Mr. Ware was far from overwhelming (App. 34c-35c): "[T]here was little forensic evidence linking Ware to the murders. No blood was found on Ware's clothing nor was the murder weapon ever recovered."

Apart from the evidence of Mr. Ware's constitutionally protected silence, the State offered no significant additional evidence at Mr. Ware's second trial. In light of the Court of Appeals' prior holding regarding the weakness of the evidence against Mr. Ware, it is completely inappropriate

that, after Mr. Ware's second trial, in which the State used his silence against him, the Court of Special Appeals only summarily analyzed the evidence, and never concluded that it was overwhelming. App. 31a-32a. Further, the Court of Special Appeals failed to engage in an independent review of the record evidence as required by this Court. *Harrington*, 395 U.S. at 254. These shortcomings by themselves are sufficient grounds on which to grant this petition.

In Mr. Ware's case, the overall lack of evidence requires that he be tried without the State trampling his right to remain silent in the face of custodial police interrogation. The State has, for the second time, failed Mr. Ware by stretching its case to cover its less than compelling evidence. This time, however, Maryland's appellate courts have also failed him.

B. The Court Below Failed to Consider the Impeachment of the State's Key Witness at Trial.

The Maryland Court of Appeals has previously stated that Edward Anderson was a "crucial witness for the State" because he was "the only sensory witness;...only Anderson placed Ware [at the scene] at the precise time of the shootings. Anderson is also the only witness who identifies Ware as the shooter." App. 34c. However, this key witness was impeached on several grounds, including that he was a convicted murderer serving a life sentence, that he had a history of lying to the police, and that he used his planned testimony in Mr. Ware's case to try to shorten his own sentence. App. 3h-13h.

The court below was required to consider the impeachment of this key witness in evaluating the strength of the evidence against Mr. Ware. *See Neder v. United States*, 527 U.S. 1, 9 (1999) (stating that harmlessness depends on

whether the evidence is "'uncontroverted,'" citing *Johnson v. United States*, 520 U.S. 461, 470 (1997)); *Brown*, 411 U.S. at 231 (stating that harmless error is that which is "merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury"). Although the court acknowledged that Mr. Anderson's testimony had been impeached, it concluded that "the jury was entitled to credit Anderson's testimony." App. 32a.

The question, however, is not whether the jury was entitled to credit Anderson's testimony, but rather, whether the testimony of this "crucial witness" was largely uncontroverted. *See Brown*, 411 U.S. at 231. Where the key witness in a case is impeached on multiple, significant grounds, such as the fact that he is a convicted murderer attempting to reduce his own sentence, a court cannot conclude that the evidence was so overwhelming as to outweigh a Fifth Amendment violation that went to the heart of the case. *Id.* Because Mr. Ware presented significant challenges to key evidence in his case, the court below was required to find that the admission of evidence in violation of Mr. Ware's constitutional right to silence was not harmless beyond a reasonable doubt. *Id.* The Court of Special Appeals' failure in that regard merits granting this petition.

II. The Court Below Improperly Dismissed the Highly Prejudicial Silence Evidence as Cumulative.

Apart from the question of whether the properly admitted evidence was overwhelming, a court must inquire whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). The erroneous admission of impactful, prejudicial evidence requires a court to find that the error was not harmless. *Id.* at

91-92 (holding that the improper admission of evidence "was prejudicial to petitioner and hence it cannot be called harmless error").

The court below misconstrued and misapplied the test for whether evidence admitted in violation of the Fifth Amendment warrants reversal, and improperly concluded that the prosecution's highly damaging statement in closing was cumulative, stating only the following:

> Had the court barred admission of appellant's silence as to the location of the gun, that would not have made the gun's absence any less conspicuous. Appellant's weapon was missing – that much was plain. The prosecutor's statement in closing arguments that appellant "doesn't answer" when asked about the location of the gun was cumulative, because the jury was presented with admissible evidence that appellant owned a gun and the police could not find it, despite their efforts to locate it.

App. 33a.

This analysis of the court below with regard to cumulativeness is flawed for two reasons. First, the court concluded that the prosecution's statement in its closing argument was cumulative because it showed, as did other evidence, that the police could not locate Mr. Ware's gun. *Id.* While the prosecution did state that the police could not locate Mr. Ware's gun, the prosecution separately argued that Mr. Ware's silence was evidence of his guilt. App. 13h-14h. The court improperly focused on the prosecution's statement that the gun was missing, not on the prosecution's use of Mr. Ware's silence as evidence of guilt. As a result, the court did

not conclude that the silence evidence itself – as opposed to the prosecution's argument – was cumulative evidence. App. 33a. Thus, the court's ruling on the cumulative nature of the evidence of Mr. Ware's silence is clearly unpersuasive.

Second, and perhaps more importantly, Mr. Ware's silence was not merely cumulative of the other evidence showing that his gun was missing. Instead, the prosecution pressed for the admission of Mr. Ware's silence because, as it argued, his silence provided evidence as to why the gun was missing, *i.e.*, because it had been used by Mr. Ware to commit the murders. App. 13h-14h. This was especially harmful because the prosecution had no evidence proving that Mr. Ware's gun was the particular gun used in the crimes. App. 34c ("[T]here was little forensic evidence linking Ware to the murders. No blood was found on Ware's clothing nor was the murder weapon ever recovered.") The prosecution plainly recognized this evidentiary gap in its case; otherwise, it undoubtedly would not have found the need to emphasize Mr. Ware's silence in its closing argument. Thus, neither the silence evidence nor the prosecution's emphasis of, and reliance on, that silence in closing arguments was cumulative of other evidence in the case, and the analysis regarding the harmlessness of the unconstitutional admission of such prejudicial evidence warrants review by this Court. *Fahy*, 375 U.S. 85.

CONCLUSION

This case presents compelling grounds for a grant of certiorari. The Court should review the ruling of the Maryland Court of Special Appeals, as uncorrected by the denial of certiorari by the Maryland Court of Appeals, because it failed to apply or misapplied the law as plainly articulated by this Court with regard to errors that violate a defendant's right to silence. To let the ruling below stand

would encourage the prosecutors of Maryland to disregard this fundamental constitutional right of all defendants. Mr. Ware respectfully requests that the Court grant his petition and order briefing and oral argument on the merits.

Respectfully submitted,

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March 7, 2007

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APPENDIX A

DARRIS ALARIC WARE v. STATE OF MARYLAND

No. 2103, SEPTEMBER TERM, 2004

COURT OF SPECIAL APPEALS OF MARYLAND

September 7, 2006, Filed

JUDGES: ARGUED BEFORE: Hollander, Eyler, Deborah S., Meredith, JJ. Opinion by Hollander, J. Opinion by Hollander, J.

OPINION BY: Hollander

OPINION: Opinion by Hollander, J.

This protracted litigation arises from the brutal murders of two young women in 1993. In 1995, Darris Ware, appellant, was convicted in the Circuit Court for Howard County (Sweeney, J.), on two counts of first-degree murder, for which he was sentenced to death. That conviction was reversed by the Court of Appeals, which determined that the State had unlawfully suppressed material evidence favorable to Ware. *See Ware v. State, 348 Md. 19, 52, 702 A.2d 699 (1997)* ("*Ware I*"). Ware was re-tried in 1999 in the Circuit Court for Anne Arundel County (Thieme, J.), and was again convicted and sentenced to death. That conviction was affirmed. *See Ware v. State, 360 Md. 650, 759 A.2d 764 (2000), cert. denied, 531 U.S. 1115, 121 S. Ct. 864, 148 L. Ed. 2d 776 (2001)* ("*Ware II*").

Thereafter, appellant filed a petition for post-conviction relief in April of 2002. The Circuit Court for Anne Arundel County (Heller, J.) granted the petition, in part, on June 28, 2002 ("*Ware III*"). It found that, for two reasons, appellant received ineffective assistance of counsel in *Ware II*.

First, the *Ware III* Court determined that Ware's appellate attorney failed to argue that the trial court erred in allowing the prosecution to introduce evidence of appellant's post-*Miranda* silence. As to that issue, the circuit court granted appellant a "belated appeal." Second, the *Ware III* Court found that Ware received ineffective assistance of trial counsel during the 1999 sentencing proceeding, because his defense attorney was not adequately prepared. Therefore, it granted Ware a new sentencing.

The Court of Appeals subsequently denied the parties' cross applications for leave to appeal. *State v. Ware, 373 Md. 550, 819 A.2d 1030 (2002)* ("*Ware IV*"). Of import here, the *Ware IV* Court ordered, *id. at 550-51*,

> that, as to the belated appeal ordered by the Circuit Court on the single issue of whether Darris Ware had received ineffective assistance of appellate counsel, consideration of that appeal is deferred pending the new sentencing proceeding, and the belated appeal will be considered with the appeal, if any, from the decision in the sentencing hearing.

On October 14, 2004, the circuit court (Manck, J.) held a new sentencing hearing, at which the State withdrew its intent to seek the death penalty and instead sought a sentence of life imprisonment, without parole. However, the court did not obtain a new pre-sentence investigation ("PSI"). Instead, at the sentencing on October 14, 2004, the court had the two earlier PSI reports, from 1995 and 1999, and imposed a sentence of life without parole.

This appeal followed, in which appellant raises the *Miranda* issue permitted by Judge Heller by way of a belated appeal, and challenges Judge Manck's sentence. The State challenges Judge Heller's ruling permitting the belated appeal of the *Miranda* issue.

Ware poses the following two issues:

> I. Whether the trial court erred, under the United States Constitution and the Maryland Declaration of Rights, by allowing the prosecution to introduce and emphasize evidence of post-*Miranda* silence[.]
>
> II. Whether the trial court's error in allowing the prosecution to introduce and emphasize evidence of post-*Miranda* silence was not harmless beyond a reasonable doubt when the prosecution used that silence as evidence of guilt and to fill a significant evidentiary gap in the State's case, and when the other evidence presented by the [S]tate was circumstantial and the State's key witness was substantially impeached[.]
>
> III. Whether the sentencing court committed plain error by failing to order and consider an updated PSI report, but instead relied upon two previous PSI reports which excluded five years of Mr. Ware's history [during his incarceration.]

The State asks:

> 1. To the extent preserved, did the trial court properly exercise discretion in admitting the testimony of Detective Michael Praley regarding his post-arrest interview with Ware?

For the reasons that follow, we shall affirm.

FACTUAL AND PROCEDURAL SUMMARY

On September 11, 1995, appellant was found guilty of two counts of first-degree murder and two counts of the use of a handgun in the commission of the murders, for which he was sentenced to death. *See Ware I, 348 Md. at 28.* However, the Court of Appeals reversed those convictions. *See Ware I.* Consequently, Ware was retried and again convicted in 1999; the Court of Appeals affirmed. *Ware II, 360 Md. 650, 759 A.2d 764.* Thereafter, appellant brought the post-conviction proceeding that led to this appeal. As the appeal is based on the 1999 trial (*Ware II*), we shall rely on the factual summary set forth by the Court of Appeals in *Ware II*,[1] and supplement it with facts pertinent to this appeal.

In *Ware II, 360 Md. at 661-63*, the Court wrote:

> Ware and Kristi Gentry[] met and began dating in 1991. Their relationship became serious, and Ware moved into the house in Severn where Kristi lived with her mother, Nina Gentry, in August of 1993. In September of 1993, however, according to Nina Gentry's testimony, the relationship became strained, and Ware moved out.
>
> On December 30, 1993, Nina Gentry returned home from work at midday and found Kristi, then 19, and her friend Cynthia Allen, 22, lying on the floor in the house. Each had been shot in the chest and at point-blank range in the head. Kristi was dead, and Cynthia died later in the hospital. Projectiles fired from a .380 caliber gun were found in the victims'

---

[1] We pause to note that we have not been provided with the complete transcript of the trial in *Ware II*.

bodies, and .380 caliber shell casings were found on the floor near the victims.

Most of the critical testimony in the case concerned events occurring the morning of the day of the murders, a few hours before Nina Gentry discovered the victims. At approximately 9:00 a.m., Kristi's friend Adrian Washington telephoned Kristi at the house. Adrian testified that Kristi sounded scared and that she abruptly hung up the phone twice. He then received a call from an angry male caller who quickly hung up; Ware's statement to the police indicated that Ware used caller ID to return Adrian's call, and told Adrian not to call the house again. Then, Adrian received a call from Kristi, during which he heard Kristi say, "Darris, I can't breathe. Get off me. You're hurting me."

After this call, Adrian immediately called his brother Thomas Washington, who in turn called the Gentrys' house. Thomas spoke to Ware, and the two argued. Thomas told Ware to stop what he was doing to Kristi, and Ware became angry. Ware asked Thomas whether he "was bulletproof" and threatened to "get [him] and [his] punk-ass brother."

After this conversation, at about 10:00 a.m., Thomas telephoned Kristi's brother Kevin Gentry at his place of employment in Laurel. Along with a co-worker, Kevin then drove to his mother's house, where he confronted Ware, beating him. Afterward, Kevin testified, Ware left the house, went to his car, retrieved a gun and pointed it at Kevin, threatening to kill him. Ware subsequently drove away. When Kevin also drove away to return to work, he came upon Ware returning to the house in his car; according to Kevin, Ware stopped and got out of the

car and brandished a gun, as Kevin attempted to run Ware over with his car. Ware escaped harm. Kevin then returned to work in Laurel, arriving there before 12:00 noon.

Deborah Amrhein, a sales clerk at the On Target shooting range and sporting goods store in Severn, told police she saw Ware in the store at about lunch time on December 30. A store manager testified that one box of .380 caliber ammunition of the type and make used by the killer was sold on December 30 at about 12:10 p.m. Neighbors of the Gentrys testified that they saw Appellant arrive back at the house between 12:00 and 12:30 p.m. In his statement to the police, Ware admitted that he owned a .380 caliber handgun. The murder weapon was never found.

At about 12:00 noon, Edward Anderson, an inmate at the Maryland House of Corrections Annex in Jessup and a friend of Kristi, telephoned the house. He spoke to Cynthia, who told him that Ware was in the house and that Kristi and Ware were arguing. Anderson heard Kristi screaming. Then, Anderson heard three gunshots, followed by silence and the sound of someone hanging up the phone. Prison records indicated that this call terminated at 12:31 p.m. Anderson then called neighbors of the Gentrys and asked them to check on the house; neighbor Clyburn Cunningham, Jr. went to the house and rang the doorbell. There was no answer.

Nina Gentry had spoken to Kevin Gentry earlier in the morning when he came, upset, to see her at her workplace, after his encounter with Ware. Some time after noon, she decided to leave work and go to the house. After finding the victims, she called 911. Paramedics and police came to the house. While the

police were in the house, Ware called, identified himself, and spoke to police officers. Ware asked if Kristi was there. A police officer asked Ware to come to the house; the officer then departed to look for Ware at an address where he was believed to live. The officer encountered Ware a short distance away, driving toward the house, and arrested him.

The Court also referred to the testimony of Antonio Barnes, Ware's roommate. He "testified on direct examination to Ware's possession of a gun and to the search of their apartment after the shootings." *Id. at 683.*

After his arrest, Mr. Ware was advised of his *Miranda* warnings.[2] Mr. Ware initialed and signed an advice of rights form, indicating that he was willing to talk to the police without the presence of counsel. Thereafter, several police officers, including Detective Michael Praley, interrogated Ware from approximately 6:21 p.m. until 1:58 a.m. Ware never confessed to the murders.

At trial, during the questioning of Detective Praley, the following ensued:

[PROSECUTOR]: Now, when you began the interview, can you tell us what you first asked the Defendant?

[PRALEY]: It was suggested to him that we could be compassionate and understand how this could occur. *From that, we didn't get a reply.* So it was at that point we asked the Defendant if he would recount his day for the last 24 hours.

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[2] *See* Miranda *v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).*

(Emphasis added.)

Detective Praley's testimony continued with the details of his question-and-answer session with Ware, which included Ware's description of his activities leading up to the time of the killings. *Id.* at 214. At that time, Mr. Ware admitted that he saw Ms. Gentry the previous morning, and claimed that they had sexual relations. *Id.* at 215. According to Ware, Ms. Gentry told him that she was pregnant, and they argued after that revelation. During the altercation, appellant struck Ms. Gentry. *Id.* at 217. He also admitted that, later in the morning, he had a fight with Ms. Gentry's brother. *Id.* at 216.

In addition, Ware admitted that he owned a ".380" handgun. Detective Praley stated: "He described it as black grips with a silver frame." The following exchange ensued:

[PROSECUTOR]: Did he tell you where that gun was?

[PRALEY]: He told me that he kept [it] at his apartment. The apartment, being his, would be described [as] the one he was staying [in] over on Village Squares with Antonio Barnes.

[PROSECUTOR]: And did he tell you that - *did he say anything about its whereabouts on December 30th*?

[PRALEY]: *The gun*?

[PROSECUTOR]: *Yes.*

[PRALEY]: *No.*

[PROSECUTOR]: Did you ask him where you could find the gun?

[PRALEY]: It was asked. *I didn't get a response.*

[PROSECUTOR]: Okay. What else did he tell you?

[DEFENSE COUNSEL]: Your Honor, can we approach for a minute?

[THE COURT]: Yes.

(Emphasis added.)

A bench conference ensued:

[DEFENSE COUNSEL]: With respect to the interrogation, I think that the only thing that is admissible are the answers that the officer asked and the responses he gets. If there is no response, that should not be admissible, his post-Miranda -

[THE COURT]: What is the theory for that?

[DEFENSE COUNSEL]: Well, there is no answer.

[THE COURT]: I mean, - have a question and then - what is the Officer supposed to say?

[DEFENSE COUNSEL]: Well, he shouldn't be allowed to testify. He should only be allowed to testify to those answers that he got - those questions that he got responses to. If he didn't get a response, he shouldn't be able to testify.

[THE COURT]: No. No. No. The point of him testifying - exercise his right to remain silent. But he has given up that right to remain silent.

[DEFENSE COUNSEL]: Which he can invoke at any time.

[THE COURT]: And you - because he chooses not to answer a damning question, that he is now re-invoking his silence?

[DEFENSE COUNSEL]: I think my concern is that the answer could be inferred that somehow the failure to answer was somehow - one might - yes. It could be interpreted that way. It could be interpreted as an invocation of Defendant. The answer could be interpreted as an invocation of Defendant.

[THE COURT]: Well, I have no indication that he has now - chooses not to speak to the officer.

[DEFENSE COUNSEL]: You have him not answering, Your Honor.

[THE COURT]: Yes. Not answering one question. Did he answer any further questions?

[DEFENSE COUNSEL]: Two questions.

[THE COURT]: All right. Two questions.

* * *

Did he answer any other questions?

[PROSECUTOR]: No. I believe that was the one that he did not respond to.

[THE COURT]: I know. But did he, the officer, ask him any other questions after this?

[PROSECUTOR]: Yes.

[DEFENSE COUNSEL]: That he got answers from?

[PROSECUTOR]: Yes.

[DEFENSE COUNSEL]: Okay.

[THE COURT]: I will leave the answer stand.

In its closing argument, the prosecution stated, without objection:

> [Defense counsel] told you, in his opening statement, that his client is innocent. Completely innocent. Well, ladies and gentlemen, *where is the innocent man's gun? The police asked him that very question, and he doesn't answer.*
>
> The police searched his Jeep. It is not there. The police looked behind the speaker in his apartment. In fact, they looked everywhere in his apartment, and that gun is nowhere to be found, ladies and gentlemen.[3] n3
>
> This is only one reason that the Defendant's gun is nowhere to be found after these murders, and it is not a coincidence. The Defendant used his .380 Davis handgun to murder Christie and Cynthia and then got rid of the murder weapon so that he wouldn't be tied to the murders he had just committed.
>
> He believes, in his mind, at that point he has gotten rid of the only witness and the weapon. He will never be caught.

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[3] We do not have the portion of the trial transcript pertaining to the search for the gun conducted by the police. However, Ware does not dispute that the police searched for his gun and never found it.

(Emphasis added.)

Mr. Ware was convicted of two counts of first-degree murder and two handgun convictions. *Ware II, 360 Md. at 660, 663.* Concluding that there were "no errors that tainted the proceedings," the Court of Appeals affirmed both the convictions and the death sentence. *Ware II, id. at 660-61.*

As noted, appellant sought post-conviction relief in 2002, which the circuit court granted, in part, on two grounds. First, the *Ware III* Court found that appellant received ineffective assistance of appellate counsel in *Ware II,* because his appellate attorney failed to challenge the admission of Detective Praley's testimony regarding appellant's post-*Miranda* silence. In its Memorandum Opinion and Order of June 28, 2002, the circuit court stated in *Ware III*:

> Mr. Ware argues that his appellate counsel should have argued on appeal the issue of the officer's testimony regarding Mr. Ware's selective silence when interviewed immediately after the murders. Mr. Ware notes that his trial counsel did object to the admissibility of such testimony. Similarly, Mr. Ware argues that appellate counsel erred in not raising the preserved error on the requested separate consideration instruction.
>
> Although Maryland law allows appellate counsel discretion in making the decision of which errors to bring forth on appeal, not raising this issue on appeal gives the Court great concern. *The Court finds the issue of the Officer's testimony regarding Ware's selective silence during his interrogation as a compelling issue on appeal, particularly since the error had been preserved by counsel.*

(Emphasis added.)[4]

Second, the circuit court determined that appellant received ineffective assistance of trial counsel at his sentencing in 1999. Therefore, the *Ware III* Court awarded appellant a new sentencing hearing, explaining:

> Mr. Ware alleges that trial counsel was ineffective because he was unprepared for the capital sentencing phase of the trial. First, Mr. Ware contends that his trial counsel expected him to elect a judge sentencing, so he was unprepared when he chose to be sentenced by a jury. Although his trial counsel sought postponement, the request was denied. Second, Mr. Ware maintains that the failure to present the sole expert witness for the defense, a social worker and mitigation specialist as a live witness instead of by video deposition, prejudiced his case. Third, Mr. Ware's trial counsel did not request any specific sentencing instructions. Particularly, Mr. Ware asserts that a youthful age instruction would have been appropriate as it was a statutory mitigator.
>
> At the post-conviction hearing, trial counsel testified that they had not been prepared for the sentencing phase of trial

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[4] Notably, the *Ware III* Court did not grant a belated appeal based on trial counsel's failure to object to the State's closing argument, in which the State mentioned appellant's failure to respond to the police inquiry concerning the gun. Because appellant's Petition for Post-Conviction Relief is not in the record, we are unable to determine whether appellant argued this point.

> before the jury and thus could not present the above mitigation evidence. Trial counsel testified that at all times they expected that the sentencing phase would be before the court. The State's Attorney, in his argument to this Court during the post conviction hearing, acknowledged error by trial counsel given the lack of preparedness for sentencing; in fact, when questioned by the Court as to the second prong of Strickland, the State's Attorney deferred the issue of prejudice for the Court's ruling rather than denying its effect. The Court concludes that these errors prejudiced Mr. Ware's sentencing phase such as to deny Mr. Ware his constitutionally guaranteed right to counsel.

The court's ruling culminated in a re-sentencing in 2004, at which the court received evidence regarding appellant's conduct in prison by way of transcripts of testimony from the 1999 sentencing hearing. [5] Moreover, "Supermax" Correctional Officer Corporal Elizabeth Bean testified that Ware was respectful and non-aggressive with prison staff, correctional officers, and other inmates; that he was helpful with laundry and cleaning; that he shared with other inmates; and that he had never been a problem inmate.

Mr. Ware also presented testimony from a forensic psychiatrist, David Williamson, M.D, who was accepted as an expert on forensic and correctional psychiatry. He "had a face-to-face interview and evaluation of the Defendant for

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[5] The transcripts included testimony from Karen Irvin and Cheryl Doyle, counselors for the Anne Arundel Department of Corrections, and Scott Smith and Karen Norman, correctional officers for the Anne Arundel Department of Corrections.

two hours" and extensively examined trial and sentencing testimony, documentary evidence of appellant's mother's mental health problems, interviews with appellant's military colleagues, social acquaintances, and extended family members. He also reviewed appellant's "base file" from the Division of Corrections and the two prior pre-sentencing investigations. Regarding Mr. Ware's "base file," Dr. Williamson stated:

> I looked at his base file for tickets or infractions in the Division of Corrections - I believe you said he has been in for 11 years; I saw one infraction, allegedly for fighting, and infractions for having a chair in his cell and not moving at feet-up time; but not a history of recurrent assaults, aggression against correctional officers, extortion from peers and the like.

In addition, the court had two PSI reports from July 1995 and July 1999, prepared for previous sentencing proceedings in the same case. The court indicated that it read all the information that had been provided. However, no request was made for an updated PSI report, nor was one obtained by the court. On the first-degree murder charges, the court sentenced Mr. Ware to two life sentences, without the possibility of parole. The court also imposed concurrent ten-year sentences for the two handgun offenses.

As noted, in 2002 the Court of Appeals deferred consideration of the belated appeal until the conclusion of the new sentencing, which occurred in October of 2004. As a result of that sentencing, this is no longer a death penalty case. Therefore, the matters of the belated appeal and the sentencing are now before this Court.

DISCUSSION

I.

The Right to Remain Silent[6] n6

A. Contentions

Appellant contends that he "twice exercised his right to remain silent during post-*Miranda* interrogation."[7] n7 Yet, he complains that, "having exercised this constitutionally protected right, the trial court permitted the prosecution to introduce [his] silence into evidence" through Detective Praley's testimony. Furthermore, he complains that the trial court erroneously permitted the prosecution, in its closing argument, to emphasize that Mr. Ware evidenced his guilt by

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[6] Given the posture of the case, *i.e.*, a belated appeal of the *Miranda* issue, it is as if the issue is before us on direct appeal.

[7] For convenience, we shall repeat the two instances in Detective Praley's testimony that are at issue here:

> [PROSECUTOR]: Now, when you began the interview, can you tell us what you first asked the Defendant?
>
> [PRALEY]: It was suggested to him that we could be compassionate and understand how this could occur. *From that, we didn't get a reply.* So it was at that point we asked the Defendant if he would recount his day for the last 24 hours.
>
> (Emphasis added.)
>
> [PROSECUTOR]: Did you ask him where you could find the gun?
>
> [PRALEY]: It was asked. *I didn't get a response.*
>
> (Emphasis added.)

remaining silent when the police asked him the location of his gun.

According to appellant, "a court must presume ... that a defendant's post-*Miranda* silence is an exercise of his Constitutional right to remain silent." Appellant insists that it is "clear error to allow a defendant's post-*Miranda* silence into evidence unless the State satisfies its heavy burden of showing by clear and convincing evidence that the defendant's silence was not an invocation of his right to remain silent." In his view, the State did not meet its "heavy burden," because it did not introduce evidence at the 1999 trial "suggesting that Mr. Ware's silence was other than an invocation of his right to remain silent," nor did the trial court make "any findings to that effect."

Furthermore, appellant argues that the error was not harmless. He claims that this Court must reverse unless the State can show, beyond a reasonable doubt, that "(1) the violation was technical in nature, *and* (2) that the erroneously admitted evidence was merely cumulative, *and* (3) that there was other properly admitted evidence that was overwhelming and largely uncontroverted." According to Mr. Ware, the trial court's error was "more than merely technical or procedural error because the court allowed the prosecution to use Mr. Ware's silence as substantive evidence of guilt, and because the error violated a substantial constitutional right of Mr. Ware." Nor was it merely cumulative, argues appellant, because the "[p]olice had not located Mr. Ware's gun, and the State could produce no direct evidence to show that his gun was used in the killings." And, he contends that the evidence against him "was not overwhelming and was controverted," and was "weaker than the evidence against the defendant in *Younie*."

The State counters: "Preliminarily, Ware failed to properly preserve his argument for appeal." Referring to

Detective Praley's testimony that Ware failed to respond when the police suggested that they had "compassion" and would "understand" what had happened, the State points out that Ware did not object when "Praley testified to the absence of a response from Ware [to that comment] during the interview...." In its view, the "failure to object constitutes a waiver of the claim on appeal." With regard to the inquiry as to the gun, the State contends: "[T]he second objection came long after the pertinent question and answer. This belated objection also constitutes a waiver of the claim on appeal."[8] n8

Even if preserved, the State argues that "the trial court's ruling was entirely correct." Although it recognizes that post- arrest silence is generally inadmissible as substantive evidence of guilt, it asserts:

> [N]one of these cases holds that the absence of a response to a question during an interview after being given full *Miranda* advisements and agreeing to the interview is the equivalent of silence. Further, it is a stretch of the imagination to read Ware's non-response to two questions as revocation of his earlier *Miranda* waiver.

Alternatively, the State posits: "Even assuming, *arguendo*, it was error to admit the testimony of Detective Praley, such error was harmless beyond a reasonable doubt." According to the State, the evidence "as recounted by the Court of Appeals" was "overwhelming" and, "[g]iven the evidence presented, which clearly established Ware's guilt in the murders ... there is no possibility that the testimony of

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[8] The State does not discuss waiver as to appellant's failure to object to the State's closing argument.

Detective Praley effected [sic] the verdict." It adds: "Although the prosecutor made mention of the testimony in closing argument, the record shows that the prosecutor did not *use* the testimony as suggested by Ware." Regarding the gun, the State contends that the prosecutor merely "commented on the absence of the gun, but did not argue that Ware's failure to answer the question constituted evidence of Ware's guilt or guilty conscience."

As noted, the circuit court granted appellant a belated appeal, based on ineffective assistance of appellate counsel, finding "the issue of Praley's testimony regarding Ware's selective silence during his interrogation as a compelling issue on appeal, *particularly since the error had been preserved* by trial counsel."

"It is well established that a party opposing the admission of evidence 'shall' object 'at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.'" *State v. Jones, 138 Md. App. 178, 218, 771 A.2d 407* (quoting Md. Rule 4-323(a)), *aff'd, 379 Md. 704, 843 A.2d 778 (2004)*; *see Klauenberg v. State, 355 Md. 528, 545, 735 A.2d 1061 (1999)*; *Prout v. State, 311 Md. 348, 356-57, 535 A.2d 445 (1988)*; *Hill v. State, 134 Md. App. 327, 351, 759 A.2d 1164, cert. denied, 362 Md. 188, 763 A.2d 735 (2000)*. Moreover, an objection must be made when the question is asked or, if the answer is objectionable, then at that time by motion to strike. *See Bruce v. State, 328 Md. 594, 627-30, 616 A.2d 392 (1992), cert. denied, 508 U.S. 963, 113 S. Ct. 2936, 124 L. Ed. 2d 686 (1993)*; *Dyce v. State, 85 Md. App. 193, 582 A.2d 582 (1990)* (generally, "improper evidence will not be preserved for appellate review unless the party asserting error objected at the time the evidence was offered or as soon thereafter as the grounds for the objection became apparent."). "A timely objection ... enables the trial court to attempt to cure any error, which helps to avoid unnecessary

appeals." *Jones, 138 Md. App. at 218*; *see Hall v. State, 119 Md. App. 377, 389, 705 A.2d 50 (1998)*. Accordingly, the admissibility of evidence may only be reviewed when an objection is timely made. *Kang v. State, 393 Md. 97, 122-23, 899 A.2d 843 (2006)*; *Klauenberg, 355 Md. at 545*; *Conyers v. State, 354 Md. 132, 149, 729 A.2d 910, cert. denied, 528 U.S. 910, 120 S. Ct. 258, 145 L. Ed. 2d 216 (1999)*; *Holmes v. State, 116 Md. App. 546, 558, 698 A.2d 1139, aff'd, 350 Md. 412, 712 A.2d 554 (1998)*.

Furthermore, objections must be reasserted unless an objection is made to a continuing line of questions. *Brown v. State, 90 Md. App. 220, 225, 600 A.2d 1126 (1992)* (noting that either an objection must be made to each question or a continuing objection must be made to the entire line of questioning). *See also Johnson v. State, 325 Md. 511, 515, 601 A.2d 1093 (1992)* (where it was apparent that the court's ruling on further objection would be unfavorable to the defense and persistent objection would only highlight the remarks for the jury, the absence of further objection did not constitute waiver); *Williams v. State, 131 Md. App. 1, 26, 748 A.2d 1 (2000)* ("When evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection.").

We shall first consider defense counsel's failure to object to Praley's testimony that appellant did not respond when the officer remarked during the interrogation that the police are "compassionate" and could "understand how this could occur." Both sides want it both ways. For purposes of waiver, the State asserts that appellant should have objected. Yet, in regard to the merits, it conveniently asserts that there was neither error nor harm because "no inference whatsoever" can be drawn from appellant's failure to reply, given that the remark "was not even a question." Similarly, to support his preservation claim, appellant conveniently

maintains that Praley's comments (that the police were "compassionate" and could "understand" what happened) were easily construed as innocuous remarks that did not invite a response, and thus no objection was required. In contrast, he vigorously asserts, on the merits, that his silence to a non-question was an invocation of his *Fifth Amendment* right.

As we see it, defense counsel's failure to object to this line of testimony constituted a waiver of any complaint about it. As we have pointed out, the State argues that no adverse inferences could be drawn from appellant's silence in regard to these remarks by Praley; they were comments, not a question, says the State. If so, then it is equally difficult to understand the State's assertion that appellant's failure to object to the comments amounted to a waiver of his complaint about the unrelated testimony concerning Ware's silence as to the gun. Put another way, defense counsel's failure to object to a non-answer to a non-question would not preclude appellate counsel from complaining about the police testimony concerning appellant's silence as to the gun, so long as an objection was timely lodged.

Therefore, we turn to the waiver issue with regard to the gun inquiry. Contrary to the State's assertion, the defense did not object to the gun inquiry "long after the pertinent question and answer." Rather, the record demonstrates th defense counsel asked to approach the bench almo immediately after Detective Praley's testimony that appellan remained silent when asked about the location of the handgun. At the bench, defense counsel raised the precise contention advanced here: the silence was inadmissible. If the defense objects "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent," the underlying issue is preserved. Md. Rule 4-

323(a); *Bruce v. State, 328 Md. 594, 627-8, 616 A.2d 392 (1992).*[9] We easily conclude that, with respect to the gun, the issue as to the admissibility of appellant's selective silence is preserved for our review.

B. Analysis

The privilege against self-incrimination is a "mainstay of the American criminal justice system." *Kosh v. State, 382 Md. 218, 233, 854 A.2d 1259 (2004).* When a defendant in police custody exercises the right to remain silent, a trial court generally may not allow the State to introduce evidence of that silence as substantive evidence of guilt. *Id. at 220* ("Post-arrest silence is inadmissible as substantive evidence of a criminal defendant's guilt, regardless of whether that silence precedes the recitation to the defendant of *Miranda* advisements.") Indeed, "Evidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose, including impeachment." *Grier v. State, 351 Md. 241, 258, 718 A.2d 211 (1998)* (citing *Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)). See U.S. CONST. amend. V* and *XIV*; MD. DEC. OF R. Art. 22; *Doyle, 426 U.S. at 618*; *Weitzel v. State, 384 Md. 451, 455-58, 863 A.2d 999 (2004).*

As the *Grier* Court explained, "'silence is so ambiguous that it is of little probative force.'" *Grier, 351 Md. at 252* (quoting *United States v. Hale, 422 U.S. 171, 176, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975)).* It added: "When a defendant is silent following *Miranda* warnings, he may be acting merely upon his right to remain silent," and "a defendant's silence at that point carries little or no probative value, and a

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[9] Although appellant did not formally move to strike, the State does not raise that contention, presumably because of appellant's lengthy but unsuccessful discussion of the issue at the bench.

significant potential for prejudice." *Id. at 258. See Miller v. State, 231 Md. 215, 218-19, 189 A.2d 635 (1962)*(suspect in custody has the right to remain silent and "'mere silence should afford no inference whatever of acquiescence'" to accusations) (citation omitted); *Garner v. State, 142 Md. App. 94, 108, 788 A.2d 219* (stating that "prosecutor should not have been permitted to ask appellant a question that ... insinuated that he chose to remain silent after he turned himself in to the police"), *cert. denied, 369 Md. 181, 798 A.2d 553 (2002)*; *Zemo v. State, 101 Md. App. 303, 646 A.2d 1050 (1994)* (holding that, after a defendant has been given his *Miranda* rights, "[a]dverse comment (nay, all comment) on a defendant's invocation of a right to silence is constitutionally forbidden"); *Wright v. State, 26 Md. App. 60, 336 A.2d 808 (1975)*; *Burko v. State, 19 Md. App. 645, 652, 313 A.2d 864 (1974)*.

According to appellant, *Younie v. State, 272 Md. 233, 322 A.2d 211 (1974)*, is "strikingly similar" to this case, and directly controls. In *Younie, 272 Md. 233, 322 A.2d 211*, the defendant was convicted of armed robbery and murder. During a custodial interrogation, he waived his right to remain silent, in that he agreed to answer "some" questions about the crimes, but refused to answer all of them. *Id. at 236-38.* Nevertheless, he signed the bottom of each page of the interrogating officer's handwritten statement of the interview. *Id. at 235.* At trial, over objection, the court admitted the officer's handwritten record of the interview, in which Younie answered fifteen out of twenty-three questions. *Id. at 236-38.* During closing argument, the State was allowed to refer to Younie's refusals to respond to all of the questions. *Id. at 238.*

On appeal, Younie complained that "his silence was a permissible exercise of his [constitutional] privilege," and therefore the trial court should not have admitted in evidence the record of his refusals to answer. *Id.* The Court of

Appeals agreed. It held that admission of evidence that the defendant remained silent "creat[ed] the highly prejudicial inference that his failure to respond was motivated by guilt...." *Id.* In the Court's view, the only reasonable inference to be drawn from the refusals to answer was that Younie elected to exercise his constitutional right to remain silent, but a jury might improperly regard his silence as a tacit admission. *Id. at 244.*

The Court instructed: "[T]he Constitution ... expressly permits [a suspect] to remain mute and not have this made known to [the jury]." *Id.* Further, it stated, *id.* (emphasis added):

> Silence in the context of a custodial inquisition is presumed to be an exercise of the privilege against self-incrimination from which no legal penalty can flow, and the State has the heavy burden of demonstrating *by clear and convincing evidence that a failure to respond was not an invocation of this right.*

The Court also said, *id. at 245*:

> Since a waiver of this constitutional right to be effective must be clearly and intentionally made, and since silence, even in the face of incriminating accusations, statements, or questions, is inaction and therefore difficult to draw an inference from, in a situation such as this where it is uncertain as to what occurred, we must assume that the peitioner's [sic] failure to answer was an invocation of his *fifth amendment* privilege. We agree with the Court of Special Appeals when it said in *Duckett v. State, 3 Md. App. 563, 578, 240 A.2d 332 (1968)* that "[a]s the [petitioner was]

> then in police custody, the admission of evidence calculated to show that [he] stood mute in the face of such accusation would, of course, have been clear error."

Appellant avers that, as in *Younie*, he was interrogated after he was arrested and signed an advisement of rights form; he selectively chose not to respond to multiple questions during custodial interrogation (including a question about the whereabouts of the suspected weapon); and police officer testimony indicated that he did not respond to certain incriminating questions. Thus, Ware insists that the trial court improperly allowed the State to introduce evidence of his silence, and erred in allowing the State to refer to Ware's silence in its closing argument.

The State maintains that the case *sub judice* is distinguishable from *Younie*. Noting that *Younie* involved an officer's handwritten statement, which showed the defendant's refusal to answer eight of twenty-three questions, the State explains:

> In the present case, there was no such written statement. In the first instance, there was not even a question. Detective Praley testified that "[i]t was suggested to him that we could be compassionate and understand how this could occur. From that, we didn't get a reply." There is no inference whatsoever that can be drawn from "no reply" to such a suggestion. In the second instance, Detective Praley's testimony established that, after Ware admitted to owning a .38 handgun, that Ware was asked about the location of the gun, and that the police did not get a response. Again, there is no inference to be drawn from Detective Praley's testimony that the police

> did not get a response to their question regarding the location of the gun. There was no indication, whatsoever, that Ware refused to answer the question, like in *Younie*. Even less reasonable is the notion that Ware revoked his *Miranda* waiver for [the] sole inquiry regarding the location of the gun, especially after he admitted to owning the gun and keeping it at his apartment.

Crosby v. State, 366 Md. 518, 784 A.2d 1102 (2001), also provides guidance. There, the defendant "was *not* silent in responding to a particular question...." Instead, he refused to put into writing that which he had already said. *Id. at 529.* The Court of Appeals considered whether that refusal amounted to an invocation of the privilege against self-incrimination and, if so, whether the testimony concerning such invocation was improperly permitted at trial, and thus "impinged" the defendant's "constitutional right to remain silent." *Id. at 529-30.* It recognized that "[a]n accused may invoke his or her rights at any time during questioning, or simply refuse to answer any question asked, and this silence cannot be used against him or her." *Id. at 529.* The Court explained: "The protections bestowed upon citizens by the privilege against self-incrimination do not disappear once the accused initially waives his or her rights. An accused may invoke his or her rights at any time during questioning, or simply refuse to answer any question asked, and this silence cannot be used against him or her." *Id.* (citations omitted).

However, the *Crosby* Court concluded that the defendant did not exercise his right to remain silent by refusing to provide a written statement after he gave an oral statement. Rather, said the Court, he simply declined "'to reduce to writing his existing statement and waiver of rights....'" *Id. at 530* (citation omitted). While recognizing that "the right to remain silent 'has always been liberally construed in order to

give fullest effect to this immunity,'" *id. at 528 n.8* (citations omitted), the Court declined "to extend *Miranda's* application to an illogical extreme." *Id. at 530. See also State v. Purvey, 129 Md. App. 1, 18-19, 740 A.2d 54 (1999)* (noting that defendant who declined to reduce his oral statement to writing "did not choose to remain silent; he only refused to reduce to writing his existing statement and waiver of rights"; the Court "refuse[d] to extend under *Miranda* ... a refusal to write out one's statement into a full-fledged assertion of one's right to silence.").

Dupree v. State, 352 Md. 314, 722 A.2d 52 (1998), is also noteworthy. There, the Court reversed a murder conviction because the police officer testified, over defense objection, that the defendant was advised of his constitutional rights and did not provide a statement to the police. *Id. at 316.* The Court determined that evidence of the advisement "lacked the threshold relevancy necessary for admissibility," *id. at 324*, and "was immaterial to any issue in the trial." *Id. at 332.* Further, it ruled that because the defendant "gave no statement to the police," the jury did not need to know of the *Miranda* warnings "to complete its appointed task." *Id.*

We are also guided by *Freeman v. State, 158 Md. App. 402, 857 A.2d 557 (2004).* Freeman was convicted of first-degree premeditated murder in connection with the fatal shooting of her boyfriend. Shortly after the shooting, appellant went to the police station, with the firearm still in her purse, and announced: "I just shot someone." *Id. at 408.* She was subsequently advised of her *Miranda* rights. *Id. at 409.* However, when asked if she would "knowingly waive these rights," appellant "didn't say anything." *Id.* The arresting officer then asked appellant "what happened tonight," to which Freeman responded, "I don't want to talk about it right now." *Id* Approximately three hours after her arrival at the police station, a second officer again advised Freeman of her *Miranda* rights, which she waived. *Id. at*

411. Freeman then gave an oral confession, which she later sought to suppress, without success. *Id. at 408.*

On appeal, Freeman argued that she had invoked her *Fifth Amendment* privilege by remaining silent when the police initially asked her if she was willing to waive her rights. *Id. at 419.* Moreover, she insisted that, because her silence was an invocation of her right to remain silent, "all questioning was required to cease." *Id.* Therefore, she claimed that her statement, "I don't want to talk about it right now," as well as her later confession, after having signed a waiver, were "erroneously admitted at trial in violation of *Miranda,*" because both were obtained after she invoked her right to silence. *Id.*

In *Freeman*, the State relied on *Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)*, which involved an ambiguous invocation of the right to counsel during an interrogation. It argued by analogy that Freeman's silence was ambiguous and did not amount to an invocation of rights. The Court observed that, unlike in *Davis*, in which the alleged invocation "occurred *during* an interrogation and *after* a waiver of rights," Freeman's first "alleged invocation of her right to silence occurred *prior* to a waiver of rights, and before interrogation ensued...." *Id. at 425.* Because appellant's silence occurred in a pre-waiver context, we declined to apply the rationale of *Davis* to appellant's silence, *id. at 429*, reasoning that "the logic of *Davis* ... does not extend to an ambiguous invocation that occurs prior to the initial waiver of rights." *Id. at 425.*

The Court concluded that the suppression court erred in failing to construe Freeman's pre-waiver silence as an invocation of the right to remain silent. *Id. at 433.* Consequently, we held that Freeman's subsequent statement, "I don't want to talk about it right now," was erroneously

admitted at trial. *Id.* Nevertheless, we determined that the error was harmless. *Id. at 434.*

In our view, the statement, "I don't want to talk about it right now," considered in context, could "not be regarded as a tacit admission of guilt." *Id. at 434.* We explained: "The undisputed evidence showed that appellant came to the police station of her own accord and immediately announced that she had shot someone." *Id.* "In that light," said the Court, appellant's "subsequent statement ... is 'fairly innocuous.'" *Id.* (citation omitted). We added that "the State certainly did not strengthen its case with the admission of [the] statement...." *Id.* Therefore, we were "amply satisfied that 'there is no reasonable possibility' that the admission of [the first statement] contributed to the rendition of the guilty verdict." Furthermore, we concluded that "it does not necessarily follow that the court erred in admitting appellant's subsequent confession," which was obtained after a valid waiver of rights.[10] *Id.* (citations omitted).

Ware's silence when the police remarked that they could be "compassionate" and understanding did not amount to an

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[10] We noted that, after Freeman stated, "I don't want to talk about it right now," her request was "'scrupulously honored' for almost three hours, until a different investigator ... sought to question her after again advising her of her *Miranda* rights. At that time, Freeman agreed to waive her rights." *Id. at 440.* In our view, Freeman's earlier assertion that she did not want to talk about it "now" did "not 'destroy all lines of communication nor make a prelude by the defendant absolutely necessary....'" *Id.* Consistent with *Michigan v. Mosley, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975)* ("[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored'"), we were satisfied that "a reasonable period of time elapsed between appellant's invocation of her right to silence ... and the interrogation conducted" three hours later by a different investigator. *Freeman, 158 Md. App. at 440.*

invocation of the right to silence; it was, as we said earlier, a non-answer to a non-question. Indeed, in arguing that his contention was preserved, despite his failure to object, appellant conceded that the remark was innocuous and did not invite a response. In that light, it is difficult to discern a basis to construe the silence as an invocation of appellant's *Fifth Amendment* right.

Even if the silence amounted to an invocation of rights, we are persuaded that the admission of the evidence was harmless beyond a reasonable doubt. We reiterate that appellant argued as to preservation that the detective's remarks did not require a response. The flip side is that it is difficult to embrace appellant's complaint of error or harm in permitting the introduction of testimony concerning a non-answer to a non- question.

On the other hand, the foregoing cases compel us to conclude that the court erred in admitting evidence of appellant's silence when he was asked about the location of the gun. As appellant asserts in his reply brief, "non-responses during custodial interrogation are clearly and precisely what the courts of the United States and Maryland consistently protect." Nevertheless, we are satisfied, beyond a reasonable doubt, that, in the context of this case, any error in admitting such evidence was harmless beyond a reasonable doubt. *See Borchardt v. State, 367 Md. 91, 131, 786 A.2d 631 (2001), cert. denied, 535 U.S. 1104, 122 S. Ct. 2309, 152 L. Ed. 2d 1064 (2002)*; *Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665 (1976)*; *Hudson v. State, 152 Md. App. 488, 508-09, 832 A.2d 834, cert. denied, 378 Md. 618, 837 A.2d 928 (2003)*. We explain.

At the outset, we reject appellant's claim that the State's case was based "purely" on circumstantial evidence. But, even if it were, the evidence is no less damning. *See Ware II, 360 Md. at 661-63*. It is well-settled that "circumstantial

evidence alone is 'sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.'" *Painter v. State*, *157 Md. App. 1, 11, 848 A.2d 692 (2004)* (citation omitted). *Accord Wilson v. State, 319 Md. 530, 537, 573 A.2d 831 (1990)*; *Hall, 119 Md. App. at 393*. Notably, there is no difference in the weight of direct or circumstantial evidence. *Mangum v. State, 342 Md. 392, 398, 676 A.2d 80 (1996)*; *Hebron v. State, 331 Md. 219, 226, 627 A.2d 1029 (1993)*; *Wagner v. State, 160 Md. App. 531, 560 n.22, 864 A.2d 1037 (2005)*; *Allen v. State, 158 Md. App. 194, 249, 857 A.2d 101 (2004), aff'd, 387 Md. 389, 875 A.2d 724 (2005)*; *Hagez v. State, 110 Md. App. 194, 204, 676 A.2d 992 (1996)*.

The evidence clearly placed appellant at the scene of the murders on the day in question. Earlier that day, he fought with Ms. Gentry's brother on the premises where the murders occurred, and brandished a gun. Appellant admitted that he owned a .38 handgun, and evidence linked Mr. Ware to the purchase of .38 caliber bullets at a sporting goods store on the day in question. A store manager testified that one box of .38 bullets was sold at about 12:10 p.m. that day, and a sales clerk at the store identified Mr. Ware as being in the store around lunch time on the day of the murders. In addition, neighbors of the Gentrys saw appellant arrive at the murder scene between noon and 12:30 p.m.

Furthermore, Edward Anderson, an inmate at the Maryland House of Corrections in Jessup, placed appellant at the scene when the gunshots were fired. He testified that at around noon he spoke on the phone with Cynthia Allen, who told him that Kristi Gentry and appellant were arguing. Anderson also testified that he heard Kristi Gentry screaming, then heard three gunshots, followed by the sound of the

telephone being hung up. Prison telephone records indicated that this call terminated at 12:31 p.m.[11]

> Anderson's testimony that the prosecutor and detective said he was being truthful when he brought information to them was inadmissible... Nevertheless, the form of the evidence reduced its prejudicial impact... Moreover, it is implicit that the police believed Anderson or they would not have gone to bat for him at the hearing on his motion to reduce his sentence. Although error, we hold that the error was harmless beyond a reasonable doubt. We are "satisfied that there is no reasonable possibility that the evidence complained of ... may have contributed to the rendition of the guilty verdict." *Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665, 678 (1976).*

Although Ware admitted to owning a .38 handgun, it was never found. Detective Praley testified that Ware said "he kept [the gun] at his apartment," and Ware's roommate testified that the police searched their apartment. In closing argument, the prosecutor stated that "[t]he police searched [Ware's] jeep. It is not there. The police looked behind the speaker in his apartment. In fact, they looked everywhere in his apartment, and that gun is nowhere to be found...." The State suggested that appellant "got rid" of the weapon because it "tied [him] to the murders." The prosecutor

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[11] Appellant avers that this witness was "substantially impeached," and he provides a transcript citation. However, that transcript is not in the record before us. In any event, the jury was entitled to credit Anderson's testimony. As the Court of Appeals stated in *Ware II, 360 Md. 679-80, 759 A.2d 764*:

asserted in her closing argument: "He believes, in his mind, at that point he has gotten rid of the only witness and the weapon."[12]

Had the court barred admission of appellant's silence as to the location of the gun, that would not have made the gun's absence any less conspicuous. Appellant's weapon was missing - that much was plain. The prosecutor's statement in closing arguments that appellant "doesn't answer" when asked about the location of the gun was cumulative, because the jury was presented with admissible evidence that appellant owned a gun and the police could not find it, despite their efforts to locate it.

II.

Pre-Sentence Investigation Report

Appellant challenges as "plain error" the trial court's failure to obtain and consider an updated PSI prior to his 2004 sentencing. He notes that, before his 1995 and 1999 sentencings, the trial courts obtained and considered then-current PSI reports. According to appellant, "[b]y relying on those two prior reports that were eight and five years old, the court in 2004 did not have the benefit of a full review of Mr. Ware's history by the Department of Parole and Probation ("DPP")."

According to appellant, Maryland Code (1999, 2005 Supp.), *6-112(c)(1) & (3) of the Correctional Services Article ("C.S.")*, required the court to consider a current PSI

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[12] As noted, the defense did not object to the State's closing, including its comment that appellant failed to answer when asked about the gun.

because he faced a sentence of life in prison without the possibility of parole. He maintains that a defendant has no obligation to request a PSI, and so his failure to do so did not relieve the court of its duty to obtain an updated PSI before imposing sentence.

Appellant concedes that "Maryland courts have yet to decide whether sentencing courts or juries must use *current* PSI reports." But, he cites to requirements in other states as to the use of current PSIs, "because they provide complete and accurate information about the defendant." He explains:

> An outdated PSI report does not provide a comprehensive picture of the defendant's history, and excludes important information about the defendant's more recent behavior. *See, e.g., People v. Laster, 140 A.D.2d 233, 528 N.Y.S.2d 831 (N.Y. App. Div. 1988)* (holding that PSI reports that were two years old and eight years old were inadequate because they lacked current information).[] Time spent in prison is likely to have had an effect on a defendant and should be considered by the sentencing judge. *People v. Saez, 121 A.D.2d 947, 948, 505 N.Y.S.2d 148 (N.Y. App. Div. 1986)* (reversing the defendant's sentencing because the court considered a PSI report that was over three years old and excluded the defendant's history while incarcerated).
>
> Similarly, the high court of Michigan has held that sentencing a defendant without complete and accurate information about him, including information related to his behavior in prison, defeats modern sentencing policies. *People v. Triplett, 407 Mich. 510, 287 N.W.2d*

> *165 (Mich. 1980).*[] In *Triplett*, the Michigan Supreme Court reasoned that a judge needs updated information about the defendant because "sentencing must be individualized and tailored to the particular circumstances of the case and the offender *at the time of sentencing*." *Id. at 166* (emphasis added). The court in *Triplett* held that the trial court erred when it relied on an outdated, four-year-old PSI report which failed to include updated information about the defendant's behavior and progress toward rehabilitation during the five years he had spent in prison. *Id.*

According to the State, we "should decline to review Mr. Ware's argument regarding the lack of an updated PSI report because Ware failed to make such an argument or request before the sentencing judge." Accordingly, the State asserts that an exercise of our discretion regarding "plain error review is unwarranted."

The State acknowledges that in *Sucik v. State, 344 Md. 611, 689 A.2d 78 (1997),* on which appellant relies, the Court ruled that the then-operative statute "imposed no duty on the defendant to request a PSI, but rather created a duty for the sentencing court." But, it distinguishes this case from *Sucik* by arguing that Mr. Ware's sentencing court had "not one, but two, PSI's that were prepared for the prior sentencing proceedings." And, it claims that other evidence presented by appellant regarding Mr. Ware's subsequent years in prison obviated the need for a third PSI.

C.S. *6-112(c)*, titled "**Presentence investigation report; other investigations and probationary services,**" provides:

> (c) *Same - Required.* - (1) The Division shall complete *a* presentence investigation

> report in each case in which the death penalty *or imprisonment for life without the possibility of parole is requested* under *2-202* or *2-203 of the Criminal Law Article.*
>
> (2) The report shall include a victim impact statement as provided under *11-402 of the Criminal Procedure Article.*
>
> (3) The court or jury before which the separate sentencing proceeding is conducted under *2-303* or *2- 304 of the Criminal Law Article* shall consider the report.

(Emphasis added.)

As we see it, resolution of this issue turns on fundamental principles of statutory construction. In ascertaining the meaning of a statute, we generally begin with the words of the text, giving them their ordinary meaning. *Lewis v. State, 348 Md. 648, 653, 705 A.2d 1128 (1998)*; *Gardner v. State, 344 Md. 642, 647-48, 689 A.2d 610 (1997)*. If a term or provision is ambiguous, we consider the language "in light of the ... objectives and purpose of the enactment," in order to ascertain the legislative intent. *Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 75, 517 A.2d 730 (1986)*. In this regard, "we may ... consider the particular problem or problems the legislature was addressing, and the objectives it sought to attain." *Sinai Hosp. of Baltimore, Inc. v. Department of Employment & Training, 309 Md. 28, 40, 522 A.2d 382 (1987)*. On the other hand, when the Legislature's intent is evident from the statutory text, and the statute is not ambiguous, we ordinarily "end our inquiry and allow the plain meaning of the statute to govern our interpretation." *Langston v. Langston, 366 Md. 490, 508, 784 A.2d 1086 (2001)*. That is the circumstance of this case.

C.S. *6-112(c)* requires the Division to complete "***a***" PSI "in **each case**...." (Emphasis added.) The statute does not provide that, upon reversal of a conviction that results in a retrial, a new PSI must be obtained. The Legislature easily could have required a new PSI in such circumstances if that was its intent.

In *Sucik*, the Court ruled that it was plain error for the court not to obtain a PSI, even though "no one - not the court, the State, Sucik, or Sucik's stand-by counsel - even mentioned the statutory requirement that a PSI be obtained, *and none was prepared.*" *Id. at 614* (emphasis added). In contrast, two PSI's had already been obtained by the court by the time of Ware's last sentencing. And, each PSI included the requisite victim impact statement.[13] Moreover, despite the appeals and remands, it was, indeed, the same "case." Therefore, the literal text of *C.S. 6-112* was satisfied (the Division must complete a PSI "in each case...."). Furthermore, to the extent that appellant wanted to update the PSI to address his behavior while in prison, he did so by presenting such evidence; the sentencing court heard testimony in mitigation that accounted for the previous five years of Ware's incarceration.

In regard to the imposition of sentence, a judge ordinarily considers the facts and circumstances of the crime, the defendant's background, and any prior offenses. *Poe v. State, 341 Md. 523, 531, 532, 671 A.2d 501 (1996).* "The decision to incarcerate a defendant," wrote the Court of Appeals in *Nelson v. State, 315 Md. 62, 553 A.2d 667 (1989),*

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[13] It is unclear whether the trial court received current victim impact statements. The transcript of the sentencing hearing indicates that members of Ms. Gentry's family were not in favor of the death penalty.

> is the most important single decision made by the criminal justice system. It is, therefore, essential, in our view, that the decision be a knowledgeable one and that the sentencing judges be provided with a quantity of information necessary to insure appropriate dispositions.

Id. at 68 (quoting testimony of the Deputy Secretary of the Department of Public Safety and Correctional Services). The two PSIs and the additional information presented to the court are consistent with a sentencing judge's dispensation of a "knowledgeable" disposition. The trial court did not err by not obtaining a third PSI report.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

MANDATE

Court of Special Appeals

No. 0213, September Term, 2004

Darris Alaric Ware
vs.
State of Maryland

JUDGMENT: September 7, 2006: Judgment of the Circuit Court for Anne Arundel County affirmed. Costs to be paid by appellant. Reported Opinion by Hollander, J.

October 10, 2006: Mandate issued.

From the Circuit Court: for **ANNE ARUNDEL COUNTY**
02K980001096

STATEMENT OF COSTS:

Appellant(s) :

Lower Court Costs-	60.00
Steno Costs of Appellant-	787.50
Brief of Appellant-	230.40
Reply of Appellant-	57.60

Appellee(s) :

Brief of Appellee-	75.60

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this **tenth** *day of* **October 2006**.

Leslie D. Gradet
Clerk of the Court of Special Appeals

COSTS SHOWN ON THIS MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND NOT THROUGH THIS OFFICE.

APPENDIX B

DARRIS ALARIC WARE	*	**IN THE**
	*	**COURT OF APPEALS**
v.		
	*	**OF MARYLAND**
STATE OF MARYLAND		
	*	**Petition Docket No. 417 September Term, 2006**
	*	
	*	**(No. 2103, Sept. Term, 2004 Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the conditional cross-petition and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: December 15, 2006

APPENDIX C

DARRIS ALARIC WARE v. STATE OF MARYLAND

No. 42, September Term, 1996

COURT OF APPEALS OF MARYLAND

November 18, 1997, Filed

JUDGES: ARGUED BEFORE Bell, C.J.; Eldridge, Rodowsky, Chasanow, * Karwacki, Raker, Wilner, JJ. Opinion by Raker, J. Concurring and dissenting opinion by Bell, C.J.

> * Karwacki, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the adoption of this opinion.

OPINION BY: Raker

OPINION: Opinion by Raker, J.

This case is a direct appeal from a sentence of death imposed by a jury. Md. Code (1957, 1996 Repl. Vol., 1997 Supp.) Article 27, § 414.[1] Appellant Darris Ware was convicted by a jury in the Circuit Court for Howard County of two counts of first degree murder for the murders of Bettina Krista

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[1] Unless otherwise specified, all statutory references herein shall be to Maryland Code (1957, 1996 Repl. Vol., 1997 Supp.) Article 27.

Gentry and Cynthia Allen. The same jury then sentenced him to death. Ware raises eight issues for our review.

I. Did the State's failure to disclose information concerning Edward Anderson, a State's witness with a pending motion for reconsideration of sentence in an unrelated case, violate the State's constitutional obligations under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963),* and deprive Ware of a fair trial?

II. Did the trial court erroneously instruct the jury concerning the need for unanimity on the portion of the verdict sheet that asks whether the State has proven that the aggravating circumstances outweigh the mitigating circumstances?

III. Did the trial court err in accepting written victim impact statements that had been submitted to the Division of Parole and Probation by the State's Attorney's office?

IV. Did the trial court err in denying Ware's request to introduce a tire iron as demonstrative evidence during the testimony of a defense witness who testified she saw Ware holding an item matching the description of the tire iron?

V. Did the trial court err by allowing the State to cross-examine defense witness Antonio Barnes concerning money that Ware told Barnes was buried in the backyard of the Gentry home?

VI. Did the trial court err in refusing to voir dire the jurors during its sentencing deliberations concerning a contact between a juror and police officers that

Ware claimed he saw while being transported from the courthouse to the detention center?

VII. Did the trial court err in overruling Ware's objections to the prosecutor's closing argument at sentencing?

VIII. Did the trial court err in rejecting Ware's claim that irregularities in the jury's sentencing determination required setting aside the sentence of death?

I.

On December 30, 1993, eighteen year old Bettina Krista Gentry (Kristi)[2] was found dead in her home. When the emergency personnel arrived, Kristi's friend, twenty-two year old Cynthia Allen (Allen), was injured but still alive. Allen subsequently died from her injuries. Both women had suffered gunshot wounds.

Ware and Kristi Gentry had dated since 1992 and were engaged to be married.[3] Ware visited the Gentry home on the morning of December 30, 1993. Much of what is known about that morning comes from a series of telephone calls to and from the Gentry household. While Ware was at the Gentry home that morning, Kristi received a phone call from her friend Adrian Washington. Adrian Washington testified that he spoke to Kristi twice that morning and that both times she sounded "scared," "shaky," and "desperate."

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[2] Throughout this opinion, we shall refer to Bettina Krista Gentry as "Kristi," the name the parties used throughout trial, rather than by her last name to avoid confusing her with her mother or brother.

[3] Kristi's mother, Nina Gentry, testified that the relationship between her daughter and Ware had begun to sour in September, 1993, and that ultimately Kristi told Ware that the relationship was over. Ware, however, referred to Kristi Gentry as his fiancee in his conversations with detectives.

Immediately after finishing the conversation with Kristi, Adrian Washington received a phone call from a man with an "angry" voice who threatened him. Washington testified that he heard Kristi's voice in the background during this conversation. Adrian Washington then called his brother, Thomas Washington, and described his phone conversations with Kristi. Thomas Washington called the Gentry residence and he testified that Kristi sounded upset when he spoke with her. Kristi told Thomas Washington that Ware and she had been fighting and arguing and that Ware would not leave the house. Thomas Washington then asked to speak with Ware and told him to leave the Gentry house.

At approximately 10:30 a.m., Thomas Washington called Kevin Gentry, Kristi's brother, at work. Kevin Gentry left work and went to the house of his mother and sister immediately after receiving Thomas Washington's call. Ware answered the door at the Gentry residence. Kevin Gentry then beat him and threw him out of the house. Kevin Gentry testified that after he threw Ware out of the house, Ware took a gun from his Jeep and pointed it at Kevin Gentry. In Ware's statement to the detectives after his arrest, however, he stated that he had instead thrown a crowbar at Kevin Gentry in self-defense. Other witnesses testify that they saw Ware near the Gentry home holding a long, dark object. Kevin Gentry and Ware encountered one another again on the road leaving the Gentry home. Kevin Gentry testified that Ware approached Gentry's car with a gun. A fifteen year old neighbor who was outside shoveling snow witnessed the altercation between Kevin Gentry and Ware and testified that it occurred sometime between 11:00 a.m. and noon. After the fight, the witness saw Ware go inside the Gentry home, and shortly thereafter, he saw Kristi and a friend also enter the Gentry home.

The events inside the Gentry home are revealed as a result of a telephone conversation. Edward Anderson was

incarcerated at the Maryland House of Corrections Annex on December 30, 1993. Anderson knew both Kristi and Allen. Allen was the mother of Anderson's six-year-old daughter, and Kristi had recently visited Anderson in prison. Anderson testified that he called the Gentry home about noon on December 30[4] and that Allen answered the telephone. Allen informed Anderson that Ware was at the Gentry house. A few minutes later Kristi began to scream, and Allen asked Anderson to hold while she checked on Kristi. Anderson testified that Allen then returned to the phone and explained to him that Darris and Kristi were "fussing." Anderson and Allen continued their conversation for about five minutes longer when Allen again told Anderson to hold while she checked on Kristi. After Allen left the phone the second time, Anderson testified that he heard screaming in the background and then heard three gunshots--two in rapid succession, then a pause lasting between ten and thirty seconds, and then a third shot. Allen never returned to the phone and the phone was "hung up" about thirty seconds later. Anderson then telephoned friends who lived nearby to tell them that he heard gunshots at the Gentry residence and to ask them to go immediately to the Gentry home to make sure everything was alright. Clyburn Cunningham, Jr., who was staying in a house nearby, went to the Gentry home and knocked on the door. No one answered the door and Cunningham did not see anything askew through the windows.

Nina Gentry, Kristi's mother, discovered Kristi and Allen when she returned home from work at approximately 1:30 p.m. Police and rescue workers arrived shortly thereafter and transported Allen, who was still alive, to the hospital. While

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[4] The telephone records from the prison confirm that Anderson placed an outgoing call to the Gentry's telephone number on December 30, 1993 at 12:01 p.m. The call lasted thirty minutes.

the police were at the Gentry home, Ware telephoned and spoke with a police officer, Officer Knight, who told him that he should come to the Gentry home to speak with the officers. Officer Knight then spoke with Kevin Gentry, who told him where Ware lived. Officer Knight was leaving the Gentry residence to go to Ware's apartment when he encountered Ware approaching the Gentry home in his Jeep. Officer Knight stopped the Jeep and arrested Ware. We shall supply additional facts relevant to the resolution of this appeal as necessary throughout the opinion.

The Grand Jury for Anne Arundel County indicted Ware on two counts of first degree murder, two counts of use of a handgun in the commission of a felony, and two counts of use of a handgun in the commission of a crime of violence. The State filed notice of intent to seek the death penalty, *see* Md. Code (1957, 1996 Repl. Vol., 1997 Supp.) Art. 27, § 412(b), and the case was removed to the Circuit Court for Howard County for trial. Md. Rule 4-254 (b)(1). On September 11, 1995, the jury returned verdicts of guilty on all counts. Sentencing began on October 2, 1995, and the same jury sentenced Ware to death for each count of first degree murder. The court also imposed two twenty year sentences for use of a handgun in the commission of a felony. This appeal followed.

II. The *Brady* Issue

A.

Ware's first contention is that his trial was unfair because the State failed to disclose material, exculpatory evidence under *Brady v. Maryland, 373 U.S. at 86, 83 S. Ct. at 1196,* and a new trial is required. We agree.

In February 1994, Ware filed his first Request for Discovery and Motion to Produce Documents.[5] In that discovery motion, he requested, *inter alia*, disclosure of the existence, substance and the manner of execution or fulfillment of any promises, inducements, agreements, rewards, understandings or arrangements, either verbal or written, to any witness including but not limited to any of the following agreements: . . . (5) to assist in any way any witnesses' ability to obtain a favorable ruling on any motion for modification of sentence which is presently pending or will be filed at a future date on any case. . . .

Ware received no response from the State. In late November 1994, Ware filed a Supplemental Discovery Motion to Compel Disclosure of Existence and Substance of Promise of Immunity, Leniency or Preferential Treatment Offered to Any State's Witness. The supplemental motion contained the same request as the original discovery motion. On December 8, 1994, Judge Lawrence Rushworth held a hearing in the Circuit Court for Anne Arundel County to address Ware's pre-trial motions. The parties specifically addressed Ware's request to compel disclosure of any agreements between the State and any of its witnesses. Ware's counsel expressed particular concern about Edward Anderson, who defense counsel knew was serving a life sentence for first degree murder. The following exchange occurred:

[DEFENSE COUNSEL]: There's a particular concern in this case, Mr. Edward Anderson who I've spoken to before is

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[5] Ware's motion was based on Maryland Rule 4-263(a) as well as the disclosure requirements articulated in *Brady v. Maryland* and its progeny. Citing *Gilliam v. State, 331 Md. 651, 686, 629 A.2d 685, 703 (1993),* appellant elected to treat both alleged violations together. We shall do the same.

currently serving a life-plus-ten sentence in Jessup for first-degree murder and as I indicated, I do believe that the State is planning on calling that person.

THE COURT: The motion is to exclude the testimony?

[DEFENSE COUNSEL]: No, sir. It is to disclose . . . any deals that . . .

THE COURT: Any deals.

[DEFENSE COUNSEL]: Essentially. And it is on grounds that I'm sure this court is very familiar with based on its own practice. It's *Brady* grounds essentially. The question is whether there is--whether there is any information which . . . would indicate that Mr. Anderson is selling testimony, for lack of a better shorthand phrase.

THE COURT: State?

[THE STATE]: It's . . . counsel's primary goal to keep him from testifying in this case. So again, . . . my point is that it's a moot issue at this time because he has not been called to testify in this case. Certainly if he does testify, he's subject to cross- examinations as to any kind of motives or . . . reasons for testifying in the manner in which he did, and information that the counsel has requested is not covered by the rules of discovery, which have been complied with . . . by the State in this case.

And . . . for those reasons . . . it's a moot issue at this point, he has not become a witness.

[DEFENSE COUNSEL]: It's not moot at this point, your Honor, because . . . this guy is going to be a witness of some kind, and if the State is giving him leniency in his current life

term, and that is certainly information which the defense is entitled to for purposes of cross-examination.

Now, they know whether they've offered him anything or not to date and . . . if the State indicates that they have not, then I will certainly renew my request at the time of trial. But I'm trying to determine whether anything has been offered at this point.

THE COURT: Then . . . it's addressed by *Brady* . . . if the State has made a deal and isn't forthcoming with that information, there are sanctions.

[THE STATE]: But, your honor, . . . *Brady* deals with exculpatory information; and exculpatory information is information that, number one, is indicative that the defendant did not commit the crime, or innocent, or that would mitigate punishment in the case.

What I have already indicated on many, many occasions that I'm unaware of any evidence at the present time that would be deemed exculpatory or would mitigate punishment under relevant state and federal case law and the statutes. And that's the State's representation in this case.

What may have been said to this witness or another witness or any witness and how that might be construed by Mr. Blumberg or by the court or by me or by anyone else is a matter of conjecture for anyone. But--but the point is I've made a representation that I know of no exculpatory information or information that would mitigate punishment under Brady; and as the court has indicated, you know, there are sanctions that are clearly for that.

Again, we're going on a fishing expedition here, wanting to know basically not just Mr. Anderson, but any witness in this case, what--you know, . . . whose interpretation of what

is said to someone and what it means is--is up for anyone to . . . figure out. If Mr. Anderson or another witness takes the stand, Mr. Blumberg is free to inquire as to any promises, threats, inducements, or anything along those lines. . .

The circuit court denied the motion to compel disclosure of any agreements with Edward Anderson.

The issue of agreements or understandings with Anderson arose again before the cross-examination of Anderson at Ware's trial. Defense counsel again requested "to be provided with any offers of leniency to Mr. Anderson by the State in exchange for his testimony." The court then asked the prosecutor whether there were any such offers of leniency, and Gerald Anders, the Assistant State's Attorney prosecuting Ware's case, replied:

The only statements made to the witness, Your Honor, was that if he in fact testified in this case and was placed in any type of danger in the House of Correction because of his testimony, that I would do what I could to protect him by putting him in isolation or protective custody.

To clarify Anders's statement the court asked, "So that's the only agreement, to your knowledge, that's been reached?" Anders replied, "Yes, sir." The defense cross-examined Anderson, which did not include any questions about Anderson's pending motion for reconsideration of sentence.

We take our account of the facts surrounding Anderson's motion for reconsideration from the hearing on Ware's motion for a new trial. Edward Anderson is serving a life sentence for an unrelated murder. In January 1994, he contacted Tania Porter, an attorney, seeking representation in his efforts to get his life sentence modified. When Porter first met with Anderson in May 1994, he informed Porter that he

would be testifying for the State in Ware's upcoming trial and, as a result, that he feared for his safety in prison. Upon learning of her client's cooperation in Ware's case, Porter filed a Supplemental Motion for Reconsideration of Anderson's life sentence[6] in the Circuit Court for Baltimore County and contacted Gerald Anders. She asked Anders to write a letter to James Gentry,[7] n7 the Baltimore County Assistant State's Attorney handling Anderson's sentence modification, to explain that Anderson was testifying in the Ware trial. The letter from Anders to Gentry is dated December 7, 1994, and states in pertinent part:

Mr. Anderson has come forward voluntarily to provide information in this case, has appeared before the Grand Jury and has agreed to testify at trial despite the considerable risk which this entails for one incarcerated. No promise or inducements have been made to him and I feel he has been honest and truthful in this matter in every respect.

Out of concern for her client's safety, Porter did not attach Anders's letter to her motion for reconsideration. Porter also wrote a letter to the trial judge, Judge Joseph F. Murphy, now Chief Judge of the Court of Special Appeals, before whom Anderson's motion for reconsideration of sentence was pending.[8] She informed Judge Murphy that

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[6] Porter filed a supplemental motion because Anderson's original attorney had filed a motion for reconsideration within 90 days of Anderson's conviction in 1990.

[7] James Gentry is no relation to Kristi Gentry.

[8] Judge Joseph F. Murphy presided over Anderson's trial and sentencing in 1990. He was appointed to the Court of Special Appeals in 1993. He was cross designated by the Court of Appeals to sit as Judge of the Circuit Court, and he apparently returned to the Circuit Court for *(cont'd)*

Anderson had testified before the grand jury in the Ware matter and that he had agreed to testify at trial. To protect his safety, she asked that the letter not be made part of Anderson's court file, and the court agreed to exclude the letter from the file.

Judge Murphy held a hearing on Anderson's motion for reconsideration of sentence on April 19, 1995. Porter, Anderson's counsel, questioned Anderson at the hearing concerning his involvement in the Ware case. Anderson testified that he had been on the telephone when a double homicide occurred at the residence he had called. He also stated that he had testified before the grand jury and had agreed to testify at trial as well. In response to the question "What did you do when you heard the shots?" Anderson replied:

I--I just reacted in--did what any normal person would do. I got off the phone. I called back and there was no answer so I called someone that lives close by and told them to call the police *I just heard two gunshots*.

Anders also testified at the hearing, and stated that Anderson was a State's witness in a death penalty case he was prosecuting and that Anderson would testify that he heard *two* shots during the telephone conversation.[9] At the close of the hearing, the court ruled as follows:

My decision today is to be granted in part, . . . but I will reserve in part as well. I want to know what happens at the case Mr. Anders is prosecuting when this goes [to] trial in

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Baltimore County to hear Anderson's Supplemental Motion for Reconsideration of Sentence.

[9] At trial, Anderson testified that he heard three shots, not two.

the Circuit Court for Anne Arundel County. . . . We can look at this again after the case in Anne Arundel County. Mr. Anders's position may be a little different when Mr. Anders hears what his position, his position may be a little different. I'm not saying it ought to be, I'm simply saying it might be.

After the hearing, Porter testified that Anders phoned her and told her that she did a good job. Because Anders left the hearing before the end, Porter informed him that the court had held the matter *sub curia* pending the conclusion of the Ware trial. In subsequent conversations, Anders and Porter discussed arrangements to have Anderson moved from Jessup to the Frederick County Detention Center pending Ware's trial. Porter testified that Anders offered to prepare the pleadings necessary to accomplish Anderson's transfer, which he then faxed to her.

On October 10, 1995, after Ware had been convicted and sentenced to death, Anders wrote a letter to Judge Murphy upon Porter's request. Anders wrote, in pertinent part:

Mr. Anderson appeared as a State witness in State v. Darris Alaric Ware . . . and was truthful and cooperative in every respect. Mr. Ware was convicted of two counts of first degree murder and sentenced to death.

If I can provide any further information or can be of any assistance, please let me know at your convenience.

In November 1995, Ware's counsel learned that Anderson's motion for reconsideration of sentence was pending at the time he testified against Ware. Ware then supplemented his motion for new trial[10] with the additional

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[10] At the time Ware's counsel learned of Anderson's pending motion for reconsideration of sentence, counsel had already filed on *(cont'd)*

ground that the State violated its obligations under *Brady v. Maryland* in failing to disclose exculpatory evidence when it failed to disclose any of the information regarding the State's involvement in Anderson's pending motion for reconsideration of sentence. In considering Ware's motion for a new trial, the trial court ruled that "there was an understanding, an arrangement, or an agreement that the State would provide a favorable report to Judge Murphy should Mr. Anderson testify, in Mr. Anders's view, in a truthful and cooperative fashion, and that the report would be forwarded on to Judge Murphy." The court's ruling was based on several facts: (1) that Judge Murphy deferred ruling on Anderson's motion for reconsideration until after Anderson testified at Ware's trial, (2) that Judge Murphy would receive a report commenting on Anderson's testimony, and (3) that Anders, the Assistant State's Attorney prosecuting Ware, would participate in either making the report or evaluation that could determine Mr. Anderson's fate. The trial court wrote:

> There is here an ongoing year-long relationship among the witness, his defense counsel, and the prosecutor, in which the prosecutor's actions of helpful letters, testimony, and security assistance, coupled with the manner in which the Circuit Court for Baltimore County left the reconsideration pending until after the *Ware* trial, created the understanding, arrangement, or agreement the Court has found in this case.

The trial court nevertheless denied the motion for a new trial. The court found that most of the information that was allegedly suppressed was "readily available" to Ware

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Ware's behalf a motion for a new trial. The substance of this motion for a new trial is not relevant to our analysis.

through "diligent investigation." Hence, the court reasoned, there was no *Brady* violation as to the nondisclosed material. The court found that the State had suppressed information concerning the understanding, arrangement, or agreement between Anderson and the State, but the court could not conclude "that the suppression of this fact--the fact of the agreement--creates a 'reasonable probability' of a different result or that this evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." The trial court reasoned that the State's evidence was overwhelming; that the "central essence" of the non-disclosed agreement "would have been fully before the jury" through the available information that defense counsel did not present; and that "chipping further away at the edges of Edward Anderson's testimony by use of the suppressed agreement would likely only have opened the door for an impressive rehabilitation of his testimony." Although the court denied Ware's motion for a new trial, Judge Sweeney commented:

> While the Court retains full confidence in the jury's verdict and sentence, the Court believes it is highly unfortunate that the prosecutor in this case, apparently ignorant of the nuances of modern *Brady* law, employed a pinched and myopic view of what constitutes an agreement when responding to the Court's inquiry. While this Court has determined that a new trial is not warranted, the prosecutor's error will undoubtedly cast a troubling cloud over this case until its ultimate conclusion. By "tacking too close to the wind,"[11] the State has unnecessarily tainted the conviction and death sentence it worked so hard to obtain.

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[11] Justice Souter spoke of the prosecutor "tacking too close to the wind" in *Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).* Justice Souter wrote:

[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. *See Agurs, 427 U.S. [97,] 108, 96 S. Ct. [2392,] 2399-2400* [(1976)]("The prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as the 'representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.' *Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).* And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. *See Rose v. Clark, 478 U.S. 570, 577-578, 106 S. Ct. 3101, 3105-3106, 92 L. Ed. 2d 460 (1986).*

514 U.S. at 439-40, 115 S. Ct. at 1568-69.

B.

Ware maintains that the State's failure to disclose the information surrounding Edward Anderson violated its *Brady* obligations and deprived him of due process. Ware contends that the State had a duty to disclose the following information: (1) that there was a motion for reconsideration of sentence pending for Edward Anderson; (2) that the Assistant State's Attorney, Gerald Anders, testified on Anderson's behalf at the hearing on the motion for reconsideration; (3) that the circuit court judge in Baltimore County presiding over Anderson's motion for reconsideration held Anderson's motion for reconsideration *sub curia* pending the outcome of Ware's trial; (4) that Anderson's testimony at his sentence modification hearing was inconsistent with his trial testimony regarding the number of gunshots he heard over the telephone; and (5) that there existed an implied promise of assistance by prosecutor Anders to Edward Anderson. Ware argues that the failure to

disclose this information was material and that this information, if used at trial, would have had a substantial effect on Anderson's credibility, and could have caused the jury to disbelieve Anderson, or "at the very least, the suppressed evidence regarding the differing number of shots could have meant the difference between first and second degree murder as to Kristi Gentry."

The State, on the other hand, contends that *Brady* does not require the State to disclose this information because it was reasonably available to the defense through the exercise of due diligence. According to the State, the prosecutor's response to Ware's requests for information about agreements with Anderson should have alerted the defense of the need to continue its independent investigation of any judicial proceedings against Mr. Anderson.[12] The State further argues that because there was ample evidence that Ware was the perpetrator of the murders and that the killings were premeditated, the undisclosed information was not material.

C.

In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *373 U.S. at 87, 83 S. Ct. at 1196. See also Bloodsworth v. State, 307 Md. 164, 175, 512 A.2d 1056, 1061 (1986);*

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[12] The State concedes that the prosecutor misconstrued *Brady* as not applying to impeachment evidence. The State argues, however, that this "merely underscores the conspicuously limited scope of the prosecutor's affirmative representation at the December 8, 1994 hearing."

Maryland v. Brady, 226 Md. 422, 430, 174 A.2d 167, 171 (1961). There is no distinction between exculpatory evidence and impeachment evidence. *United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985); Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972), Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959)* (holding that a prosecutor's failure to correct false testimony violates due process even when the testimony relates solely to a witness's credibility).

To establish a *Brady* violation, the defendant must establish (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense--either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness--and (3) that the suppressed evidence is material. *United States v. Bagley, 473 U.S. at 674-78, 105 S. Ct. at 3379-81; Giglio v. United States, 405 U.S. at 153- 54, 92 S. Ct. at 766; Brady, 373 U.S. at 87, 83 S. Ct. at 1196.* The failure of the prosecutor to disclose favorable, material evidence violates due process without regard to the good faith or bad faith of the prosecutor. *Brady, 373 U.S. at 87, 83 S. Ct. at 1196-1197.* "Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio, 405 U.S. at 154, 92 S. Ct. at 766.* This obligation was summarized in *United States v. Agurs, 427 U.S. 97, 110, 96 S. Ct. 2392, 2400-01, 49 L. Ed. 2d 342 (1976):*

"The constitutional obligation is [not] measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it . . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."

SUPPRESSION OF EVIDENCE BY THE STATE

In *United States v. Bagley, 473 U.S. at 675, 105 S. Ct. at 3380,* the Supreme Court explained that the *Brady* rule was not intended "to displace the adversary system as the primary means by which truth is uncovered." Accordingly, the *Brady* rule does not relieve the defendant from the obligation to investigate the case and prepare for trial. The prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly suppressed was available to the defendant through reasonable and diligent investigation. *See, e.g., Hoke v. Netherland, 92 F.3d 1350, 1355* (4th Cir.), *cert. denied, U.S. , 117 S. Ct. 630, 136 L. Ed. 2d 548 (1996). Brady* offers a defendant no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence. *See United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995), cert. denied, 516 U.S. 1165, 134 L. Ed. 2d 201, 116 S. Ct. 1056 (1996); Barnes v. Thompson, 58 F.3d 971, 975 (4th Cir. 1995)* (holding that no *Brady* violation exists when exculpatory evidence is available to the defendant from a source where a reasonable defendant would have looked); *see also United States v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994).*

Merely because evidence is available through public records, however, does not necessarily mean that it is available to the accused for purposes of determining whether the *Brady* rule applies. As the United States Court of Appeals for the Fourth Circuit has noted, "there is no general 'public records' exception to the *Brady* rule." *Chavis v. North Carolina, 637 F.2d 213, 225 (4th Cir. 1980).* Even when the exculpatory information can be found in public records, the necessary inquiry is whether the defendant knew or should have known facts that would have allowed him to access the undisclosed evidence. *Payne, 63 F.3d at 1208.*

Furthermore, the existence of evidence in the public record does not suffice to relieve the State of its duty to disclose material, favorable evidence to the defense unless a reasonable defendant would have looked to that public record in the exercise of due diligence. *Kelly, 35 F.3d at 937* (holding that exculpatory evidence not reasonably available as a public record when the document was not filed until the day on which the defense rested its case).

The case of *United States v. Payne, 63 F.3d at 1205,* is factually similar to the instant case. In *Payne*, the government did not disclose to the defense an affidavit of a State's witness, Wilkerson, who had pled guilty to narcotics charges arising out of the same activity for which Payne was indicted. In an affidavit, submitted to the trial court prior to her guilty plea, Wilkerson stated under oath that she "never entered into any conspiracy to sell or possess narcotics with anyone" and that she had "never sold any narcotics." *Id.* Wilkerson subsequently pled guilty to distribution and possession with intent to distribute crack and possession of firearms in connection with drug trafficking. *Id.* At Payne's trial, she testified that Payne had lured her into the drug trade and that she was only selling drugs to put herself through school. *Id. at 1206.* The defense was not aware of Wilkerson's prior statement under oath that she had never sold drugs. The government in *Payne* contended that it had no duty to disclose the Wilkerson affidavit because it was in public court records to which Payne had access. The Second Circuit rejected this contention. Noting the established rule that "documents that are part of the public records are not deemed suppressed if defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation," *id. at 1208,* the Second Circuit concluded that Payne had no reason to believe that Wilkerson had filed an affidavit nor did he have any indication of facts that would have required him to discover

the affidavit. *Id. at 1209.* Accordingly, the court held that "the government had suppressed the Wilkerson affidavit within the meaning of *Brady*." *Id.*[13]

FAVORABLE TO THE ACCUSED

In addition to establishing that the State suppressed evidence, the defendant must also prove that the evidence is favorable to the accused. *Brady, 373 U.S. at 87, 83 S. Ct. at 1196.* Favorable evidence includes not only evidence that is directly exculpatory, but also evidence that can be used to impeach witnesses against the accused. *Giglio, 405 U.S. at 154, 92 S. Ct. at 766.*

Evidence that the State has entered into an agreement with a witness, whether formally or informally, is often powerful impeachment evidence and the existence of such a "deal" must be disclosed to the accused. S*ee Marshall v. State, 346 Md. 186, 198, 695 A.2d 184, 190 (1997); Giglio, 405 U.S. at 153-54, 92 S. Ct. at 766; see also United States v. Smith, 316 U.S. App. D.C. 199, 77 F.3d 511, 516 (D.C. Cir. 1996).* The importance of such evidence was underscored by the United States Supreme Court in *Napue v. Illinois, 360 U.S. at 269, 79 S. Ct. at 1177:*

The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

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[13] The Second Circuit in *United States v. Payne, 63 F.3d 1200, 1210 (2d Cir. 1995)* held that the suppressed evidence was not material because "Wilkerson's testimony was but a fraction of the evidence linking Payne to narcotics dealing." *Id. at 1210.*

In *Giglio*, the Supreme Court made clear that the prosecutor's duty to disclose applies to *any* understanding or agreement between the witness and the State. *Giglio, 405 U.S. at 155, 92 S. Ct. at 766.* Moreover, an agreement or understanding between the witness and the State need not be formal or detailed to come within the prosecutor's duty to disclose. *Id. See, e.g., Reutter v. Solem, 888 F.2d 578, 582 (8th Cir. 1989); United States v. Shaffer, 789 F.2d 682, 690 (9th Cir. 1986)* (holding that "facts which imply an agreement would also bear on [the witness's] credibility and would have to be disclosed"); *Jimenez v. State, 112 Nev. 610, 918 P.2d 687, 695 (Nev. 1996)* (holding that prosecution had duty to disclose benefits given to witness even though at the time witness agreed to testify no benefits had been given); *Patillo v. State, 258 Ga. 255, 368 S.E.2d 493, 498* (Ga.) (holding that State should have revealed agreement "no matter how non-promising the agreement was in terms of its prospects for the witness"), *cert. denied, 488 U.S. 948, 109 S. Ct. 378, 102 L. Ed. 2d 367 (1988); People v. Cwikla, 46 N.Y.2d 434, 386 N.E.2d 1070, 1074, 414 N.Y.S.2d 102 (N.Y. 1979)* (holding that despite absence of "express promise" State should have disclosed "strong inference . . . of an expectation of leniency"); *see also United States v. Noriega, 117 F.3d 1206, 1217-18 (11th Cir. 1997)* (holding that a State's deal with a non-witness could be material if it reveals hidden motivations behind a witness's testimony).

The United States Court of Appeals for the Eighth Circuit addressed similar facts to the instant case in *Reutter v. Solem, 888 F.2d at 580-82.* In *Reutter*, the government failed to disclose that one of Reutter's co-conspirators, Trygstad, had a petition for commutation of his sentence pending before the Board of Pardons and Paroles at the time he testified against Reutter. *Id. at 580.* One of the members of the parole board scheduled to hear Trygstad's petition was an assistant attorney general assigned to prosecute Reutter's

case. *Id.* Trygstad's hearing was initially scheduled to take place on January 27, 1984, but it was delayed for one month. At the February meeting of the Board, Trygstad requested another month's delay. His hearing finally took place on March 22, 1984, the same day that the verdict was returned against Reutter. The Board decided Trygstad's petition favorably and recommended that the Governor entirely commute Trygstad's sentence; the Governor complied. *Id.* The prosecution failed to inform Reutter of Trygstad's pending application for commutation of sentence despite the fact that the court granted Reutter's motion for disclosure of all exculpatory evidence. *Id. at 581.* The Eighth Circuit noted:

> The cross-examination of Trygstad could have been significantly more effective . . . had defense counsel known that Trygstad's hearing had been rescheduled (without explanation) on two occasions and now was set to take place soon after Trygstad's appearance as the state's star witness at petitioner's trial. It is not difficult to discern that the disclosure of this information might have had a substantial impact on the jury.

Id. The Eighth Circuit held that the fact of Trygstad's impending commutation hearing was material. *Id. at 582.* The court did not require that there be a formal or informal agreement between Trygstad and the parole board or the prosecutors in Reutter's case. Instead, the court reasoned:

> Our conclusion does not depend on a finding of either an express or an implied agreement between Trygstad and the prosecution regarding the prosecution's favorable recommendation to the parole board. The District Court found there was no agreement and this finding is not clearly erroneous. The fact that there was no agreement, however, is not determinative of whether the prosecution's actions

constituted a *Brady* violation requiring reversal under the *Bagley* standard.

Id.

People v. Cwikla, 386 N.E.2d at 1072-74 is also factually similar. The prosecutor in Cwikla's case wrote a letter to the State Department of Correctional Services concerning Cox, a witness for the State who had an upcoming parole hearing. *Id.* at 1073. The letter informed the Department that Cox had cooperated in the investigation and prosecution of Cwikla, and that as a result of Cox's cooperation, Cwikla was convicted. The letter also expressed hope that the parole board would keep Cox's cooperation in mind when considering his request for parole. *Id.* The defense requested all correspondence between the district attorney's office and the parole board, but the prosecution refused to turn over any correspondence, nor even acknowledge that any such correspondence existed. *Id.* at 1072. Similar to the Eighth Circuit in *Reutter*, the Court of Appeals of New York concluded that an express promise need not exist in order to impose a duty upon the prosecution to disclose impeachment evidence. The court concluded:

While in the present case the materials sought by defense counsel do not directly demonstrate the existence of an express promise, there is nonetheless a strong inference, at the very least, of an expectation of leniency which should have been presented to the jury for its consideration. The potential persuasiveness of this inference is suggested by the extent of the misleading and obstructive tactics employed by the Assistant District Attorney at trial. Accordingly, the failure of the prosecutor to turn over these materials was error which requires reversal of the defendants' convictions and a new trial.

Id. at 1074; *see also Patillo v. State, 368 S.E.2d at 497-98* (holding that the State should have disclosed an agreement with a witness to write a letter to the judge before whom the witness's revocation of probation was pending, but concluding that evidence of the agreement was not material).

MATERIALITY OF THE EVIDENCE

The final hurdle the accused must clear in order to establish a *Brady* violation is materiality. Not all instances of suppression of evidence warrant a new trial. Instead, the suppressed evidence must be material to the guilt or the punishment of the accused in order to violate due process and entitle the defendant to a new trial.

The United States Supreme Court recently explicated, and modified, the standard of materiality in cases of prosecutorial suppression in *Bagley*. The Supreme Court applied the *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984),* "reasonable probability" test for assessing claims of ineffective assistance of counsel to prosecutorial non-disclosure of information in the context of the *Brady* rule. The Court stated:

> In *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984),* the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., at 694* . . . .
>
> We find the *Strickland* formulation of the . . . test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Bagley, 473 U.S. at 682, 105 S. Ct. at 3383.

This Court discussed the *Brady* materiality requirement in *State v. Thomas, 325 Md. 160, 190, 599 A.2d 1171, 1185 (1992).*[14] In *Thomas*, a death penalty case, the appellant

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[14] Ware argues that the test for materiality which should be applied in this case is the test set out in *United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1963),* concerning false trial testimony. In *Agurs,* the Supreme Court set out three circumstances in which a prosecutor has a duty to disclose under *Brady*, and articulated a materiality standard for each situation. First, where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and the prosecution knew, or should have known, of the perjury," the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs, 427 U.S. at 103, 96 S. Ct. at 2397.* Second, where the prosecutor fails to disclose specifically requested evidence, the defendant is entitled to a new trial where the suppressed evidence might have affected the outcome of the trial. *Id. at 104, 96 S. Ct. at 2398.* Finally, where the prosecutor fails to disclose evidence in response to a general request, or no request at all, a higher standard of materiality (and one less favorable to the defendant) is required and a new trial is required if the undisclosed information "creates a reasonable doubt that did not otherwise exist." *Id. at 112, 96 S. Ct. at 2402.*

Ware argues that in *United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985),* the Supreme Court clarified the materiality standard only with respect to the specific request/general request or no request situations, and that the materiality test applicable to the perjured testimony context remains the more defense favorable test as set out in *Agurs. See United States v. Steinberg, 99 F.3d 1486, 1490 (9th Cir. 1996); United States v. Kelly, 35 F.3d 929, 936 n.10 (4th Cir. 1994)* (noting that because the parties did not raise the issue of whether the standard of materiality may be a lesser standard when the evidence

(cont'd)

argued that the State's failure to disclose police reports concerning the murder victim's violent criminal activities deprived him of a fair trial. Judge Karwacki, writing for the Court, articulated the applicable standard to determine whether the State's failure to disclose evidence warrants overturning the conviction:

Evidence is considered material, and relief is therefore appropriate, if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985); State v. Tichnell, 306 Md. 428, 462-63, 509 A.2d 1179, 1196-97 (1986), cert. denied, 479 U.S. 995, 107 S. Ct. 598, 93 L. Ed. 2d 598 (1986), rehearing denied, 479 U.S. 1060, 107 S. Ct. 942, 93 L. Ed. 2d 992 (1987).* In the instant case, we discern no substantial possibility that, had the police reports been revealed to Thomas's counsel, the result of the trial would have been any different.

8 This standard reflects our interpretation of the "reasonable probability" language employed by the Supreme

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demonstrates that the prosecutor presents false trial testimony, court will not consider the issue); *Ouimette v. Moran, 942 F.2d 1, 10-11(1st Cir. 1991); Roberts v. State, 110 Nev. 1121, 881 P.2d 1 (Nev. 1994)* (citing cases); *People v. Vilardi, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (N.Y. 1990); Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516, 519 (Mass. 1987)* (rejecting the *Bagley* test for materiality);

We need not decide the effect of *Bagley* on the *Agurs* perjured testimony situation, nor need we determine whether any inconsistency in Anderson's testimony amounted to perjury, because under any test, we find the undisclosed evidence to be material.

Court in *Strickland. Bowers v. State, 320 Md. [416] at 426-27, 578 A.2d [734] at 739.*

Thomas, 325 Md. at 190 & n.8, 599 A.2d at 1185 & n.8 (footnote omitted).[15]

The United States Supreme Court refined the standard for materiality in its most recent pronouncement on the subject. *See Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).* In *Kyles*, Justice Kennedy, writing for the Court, emphasized four aspects of materiality under *Bagley.* First, a showing of materiality does not require the accused to demonstrate by a preponderance of the evidence that the disclosure of the suppressed evidence would have resulted in an acquittal; rather, the touchstone of materiality is whether the suppression undermines confidence in the outcome of the trial. *Id. at 434, 115 S. Ct. at 1566.* The Court explained:

Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with

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[15] Similarly, Nevada and several other states articulate the materiality test to assess a *Brady* violation in terms of possibility rather than probability. *See, e.g. People v. Vilardi, 555 N.E.2d at 920-21.* In *Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (Nev. 1996),* the Nevada Supreme Court explained:

> In federal cases, [reasonable probability] is now the standard for requests for specific evidence as well. However, in Nevada and a number of other states a Brady violation occurring after a specific request is material if there exists a reasonable *possibility* that the claimed evidence would have affected the judgment of the trier of fact, and thus the outcome of the trial.

918 P.2d at 692 (citation omitted).

the evidence, but whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. Second, the *Bagley* materiality standard is not a sufficiency of the evidence test in that the defendant need not demonstrate that disclosure of the exculpatory evidence would have left the State with too little inculpatory evidence to convict. *Id. at 434-35, 115 S. Ct. at 1566.* Rather, one shows a *Brady* violation by demonstrating that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* Third, once the materiality standard has been satisfied, a harmless error review is not appropriate, because, by definition, no *Bagley* error could ever be harmless. *Id. at 435, 115 S. Ct. at 1566.* Finally, materiality is considered in terms of the suppressed evidence collectively, not item-by-item. *Id. at 436-37, 115 S. Ct. at 1567.*

D.

We turn now to apply these principles to the alleged *Brady* violation in this case. As Ware raises constitutional claims, our review is *de novo.* We independently evaluate the totality of the circumstances as evidenced by the entire record. *Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665, 678 (1976).*

"When the prosecutor receives a specific and relevant request," the Supreme Court noted in *Agurs, 427 U.S. at 106, 96 S. Ct. at 2399,* "the failure to make any response is seldom, if ever, excusable." If the failure to make any response is rarely excusable, then certainly a misleading

response is seldom, if ever, excusable as well. Ware made more than one specific request for disclosure of any agreements or understanding between the State and Anderson. Although under *Bagley* we no longer distinguish for purposes of determining the standard of materiality among cases in which the defense made a specific request as opposed to a general request or no request at all, the fact that the defendant made a specific request figures into the analysis nevertheless. *See* Note, *Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of United States v. Bagley, 1986 DUKE L.J. 892 (1986).* When the defendant makes a specific request and the State responds that it knows of no such evidence, the defendant is more likely to rely upon that representation and possibly, based on the State's response, forgo avenues of investigation. Justice Blackmun, writing for the Court in *Bagley*, observed that:

> We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the non-disclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

Bagley, 473 U.S. at 682-83, 105 S. Ct. at 3384. The Court further noted that the nondisclosure in response to a specific request not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.

Id. at 682, 105 S. Ct. at 3384.

We reject the State's argument that the information concerning the State's role in Anderson's motion for reconsideration of sentence was available to the defense through the exercise of due diligence. Assuming that the existence of Anderson's pending motion for reconsideration was a matter of public record, the information favorable to the defense was not so readily accessible. In order to learn that Anders had testified on Anderson's behalf, it would have been necessary for Ware to have the hearing transcribed since that information did not appear in the docket entries in Anderson's case. Likewise, in order to learn that both Anderson and Anders testified that Anderson heard two rather than three gunshots, it would have been necessary to have the hearing transcribed. It was not apparent from the docket entries that the court held the matter *sub curia* pending the outcome of Ware's case. Furthermore, the letters from Anders to James Gentry and to Judge Murphy were consciously excluded from the public records.

We conclude that, within the framework established by *Brady* and its progeny, in this case the State suppressed evidence concerning Anderson's pending motion for reconsideration of sentence. Ware did not have access to facts that would have permitted him to take advantage of the impeachment evidence stemming from Anderson's pending motion. Ware could not have been expected to embark on a fishing expedition and have the Anderson hearing transcribed in the hope that it revealed an agreement reflecting on Anderson's bias or interest when the State had at least twice represented that there were no such promises, understandings, or agreements. Indeed, the fact that the prosecutor represented, as an officer of the court and in response to a very specific request, that the defense would not find anything exculpatory concerning Edward Anderson would have led the defense to believe that further investigation of Anderson would amount to nothing more

than a fishing expedition and an unnecessary expenditure of financial and legal resources. In light of defense counsel's numerous specific requests for evidence of deals or agreements, and the State's repeated response that it knew of no such evidence, Appellant was entitled to rely on the word of the State and to direct its efforts in other directions.

It is beyond cavil that the suppressed evidence was favorable to Ware. Evidence of agreements or deals with witnesses often provides powerful impeachment evidence against a witness and enables a defendant to attack the motive or bias of a witness who might otherwise appear to have no motive to falsify or color his testimony. *See Giglio v. United States, 405 U.S. at 154-55, 92 S. Ct. at 766; see also Marshall, 346 Md. at 193, 695 A.2d at 190.* Although the State may not have entered into a tacit or formal agreement with Anderson (other than the letter agreement that the State would do whatever it could to protect Anderson in prison should his testimony endanger him), the circumstances surrounding Anderson's reconsideration of sentence were sufficient to support a strong inference that Anderson expected the State's assistance in his efforts to have his life sentence reduced. *See, e.g., Shaffer, 789 F.2d at 690* (holding that facts implying agreement sufficient to require disclosure).

In the instant case, when the Circuit Court for Baltimore County decided to hold Anderson's sentence modification *sub curia* until the resolution of the Ware trial because "Mr. Anders's position may be a little different" after he hears Anderson's testimony, Anderson might reasonably have believed that, at least in the court's mind, Anders's enthusiasm about Anderson's sentence modification depended, at least in part, on Anderson's "performance" at trial. Anderson was present in the courtroom when the judge made this ruling from the bench, and, although Anderson may have had no formal agreement or arrangement with the

State, he could have reasonably expected that testimony favorable to the State at the Ware trial would redound to his benefit in the resolution of his pending motion for reconsideration. Information supporting this sort of expectation on the part of a State's witness falls within the category of favorable, impeachment evidence which the prosecutor must disclose to the defense. The State's contention that this information did not constitute *Brady* material due to the absence of a formal agreement "appears inconsistent with the policy underlying the government's witness-incentive disclosure obligations, which [have been] described as 'ensuring that the jury knows the facts that might motivate a witness in giving testimony.'" *Noriega, 117 F.3d at 1219* (quoting *Smith v. Kemp, 715 F.2d 1459, 1467* (11th Cir.), *cert. denied, 464 U.S. 1003, 104 S. Ct. 510, 78 L. Ed. 2d 699 (1983)).*

The final step in our analysis is to determine whether the suppressed evidence is material. *See Thomas, 325 Md. at 190, 599 A.2d at 1185; see also Bagley, 473 U.S. at 682, 105 S. Ct. at 3383.* Ware claims that the withheld evidence was material because he was unable to show bias, he was denied the derivative benefit of the evidence, i.e., that there was a contradiction (or perjury) in the testimony, and he was misled into believing that no inducement existed. Ware need not demonstrate that, after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough evidence left to convict him. He need only show that the "evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles, 514 U.S. at 434-35, 115 S. Ct. at 1566.* Given Anderson's centrality to the State's case and the degree of the State's involvement in Anderson's pending motion for reconsideration of sentence, we hold that there is a substantial possibility that the result would have

been different, and that the suppression of this evidence undermines confidence in the outcome of this case.

Edward Anderson was the only sensory witness to these crimes; Anderson was the only witness who heard gunshots. Although the State presented testimony of two other witnesses, Julius Jones and Jonathan Rinehamer, who testified that they saw Ware enter the Gentry home sometime between 12:00 noon and 1:00 p.m. on December 30, 1993, only Anderson placed Ware in the Gentry home at the precise time of the shootings. Anderson is also the only witness who identifies Ware as the shooter. Furthermore, there was little forensic evidence linking Ware to the murders. No blood was found on Ware's clothing nor was the murder weapon ever recovered. The State's expert on gunshot residue identified two particles of gunshot residue on the back of Ware's left hand, but other witnesses testified that Ware had discharged his gun the previous evening. Thus, although the State presented many witnesses, Anderson was a crucial witness for the State.

Anderson's testimony is also critical as it relates to premeditation. The State heavily relied on Anderson's testimony to support its theory of premeditation. Anderson testified at trial that he heard two shots in rapid succession and then a pause of approximately ten to thirty seconds followed by the third gunshot. In his closing argument, the State's Attorney emphasized to the jury that Anderson testified that there was a pause between the second and third shots:

> Well, let's remember what Eddie Anderson said. He heard three shots. He heard bang, bang, a pause and then bang. [Ware] shot through the finger, he shot to the chest and he leaned over and put the fatal bullet in her head. Bang, bang, a pause-

> *-the deliberation, the thought--and the execution.*

Given the State's reliance on Anderson's account of hearing two shots, a pause, and then a third shot, cross-examination of Anderson concerning the fact that, at his sentence modification hearing, he stated that he heard *two* shots could have seriously impeached Anderson's credibility. Had the jury chosen not to credit Anderson's testimony, it may have disbelieved his testimony in its entirety, or concluded that the State failed to prove first degree premeditated murder and instead convicted Ware of second degree murder. If Ware was successful in undermining the State's argument with regard to premeditation, Ware would have been ineligible for the death penalty since the only aggravating circumstance which the State relied upon was that the defendant committed more than one offense of murder in the first degree arising out of the same incident. Article 27, 413(d)(9).

As in *Kyles, 514 U.S. at 445, 115 S. Ct. at 1571,* the "likely damage" of the State's suppression of evidence in this case "is best understood by taking the word of the prosecutor . . . during closing argument." The State also emphasized Anderson's credibility in closing argument:

> [Anderson's testimony] is not concocted. You know that. *And what does he got to gain? There's no indication of any promises or inducements or his getting out of jail or . . . Nothing's happening here. I mean, why would he put himself in jeopardy in an institution to come in here and make a up a lie for no reason?*

In *Reutter, 888 F.2d at 582,* discussed *supra*, the prosecutor made a similar statement in closing arguments

when in fact the government had failed to disclose that the key prosecution witness, Trygstad, currently had a pending application for commutation of sentence. The court wrote:

> The materiality of the non-disclosed information becomes even more apparent in light of the prosecutor's closing remarks, which capitalized on defense counsel's ignorance by arguing to the jury that Trygstad had no possible reason to be untruthful in his testimony because he had already been sentenced and therefore had "nothing he could gain" from cooperating with the State. Although we would have less problem with these remarks if the state had disclosed to the defense the fact of Trygstad's impending commutation hearing, in the circumstances of this case the remarks can be regarded only as misleading and highly improper.

Id.; see also State v. Oliver, 682 So. 2d 301, 310-11 (La. App. 1996) (lamenting that "to make matters worse, in the prosecutor's closing argument special mention was made of [the witness's] credibility."). We agree with the *Reutter* court that the prosecutor's claim in closing argument that Anderson had no reason to lie, under these circumstances, highlights the materiality of the suppressed information. One of the last things the jury heard in this case is that Anderson had no reason to lie.

We note that in *Kyles* the Court stressed that *Bagley* materiality is defined "in terms of suppressed evidence considered collectively, not item-by-item." *514 U.S. at 436-37, 115 S. Ct. at 1567.* In this case, each individual piece of information about the State's role in Anderson's pending modification of sentence may not alone have been material

to Ware's guilt or punishment. Ware established that: (1) Anders wrote letters on Anderson's behalf to the judge and the Assistant State's Attorney assigned to Anderson's motion for reconsideration; (2) Anderson stated at the hearing on his reconsideration of sentence that he planned to testify at Ware's trial that he heard two gunshots, a statement inconsistent with his trial testimony that he heard three gunshots; (3) Anders testified at the same hearing and stated that Anderson would testify that he heard two gunshots; (4) the circuit court held Anderson's motion for reconsideration of sentence *sub curia* pending the outcome of the Ware case since Anders's "position may be a little different" after hearing Anderson's trial testimony; (5) Anders drafted the pleadings necessary to effect Anderson's transfer to a different facility; and (6) Anders wrote a letter to the Circuit Court for Baltimore County at the request of Anderson's attorney reporting Anderson's cooperation with the State.

Taken together, the potential impact on cross-examination of the nondisclosed information is sufficient to undermine confidence in the outcome of the proceeding under these circumstances. *See Kyles, 514 U.S. at 434, 115 S. Ct. at 1566; Bagley, 473 U.S. at 682, 105 S. Ct. at 3383.* Accordingly, we find that a new trial is warranted.

III.

Given our disposition of the *Brady* violation, we need not address all of Ware's allegations of error. We shall address certain of them, however, for the guidance of the trial court on remand.

Jury Instruction

Ware contends that the trial court at the sentencing phase of his trial incorrectly instructed the jury concerning the need for unanimity in Section V of the Findings and Sentencing

Determination form. Pursuant to Maryland Rule 4-343(e), Section V of the form given to the jury read as follows:

> Section V
>
> Each individual juror shall weigh the aggravating circumstance found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstance found by that individual juror to exist.
>
> We unanimously find that the State has proven by A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstance marked "proven" in Section III outweigh the mitigating circumstances in Section IV.
>
> _____ _____
>
> Yes No

Ware requested the following jury instruction concerning the unanimity required by Section V.

> If you unanimously find that the State has proven by a preponderance of the evidence that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), the sentence shall be death. If so, you are to mark "yes" in Section [V] of the sentencing form and enter "death" in Section [VI]. If you do not unanimously find that the State has proven by a preponderance of the evidence that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), the sentence shall be life imprisonment. Then, you are to mark "no" in Section [V]

> and enter "life imprisonment" in Section [VI] and proceed to Section [VII].

The court denied Ware's requested instruction. The court instead instructed the jury using Maryland Criminal Pattern Jury Instructions (MPJI-Cr) § 7:00, as well as some additional instructions. The court instructed the jury on the unanimity requirements of Section V as follows:

> In Section V, each of you must determine for yourself whether the State has persuaded you, by a preponderance of the evidence, that the aggravating circumstance found in Section III outweighs whatever mitigating circumstance or circumstances found in Section IV. A "Yes" answer in Section V is permissible only if you are persuaded by a preponderance of the evidence that the aggravating circumstance unanimously found in Section III outweighs any mitigating circumstance or circumstances found by one or more jurors in Section IV.
>
> If any of you finds that one or more mitigating circumstances have been proven, carefully weigh any such circumstance or circumstances against the aggravating circumstance recorded in Section III. Your personal finding should be "yes" if you are persuaded, by a preponderance of evidence, that the aggravating circumstance outweighs the mitigating circumstance or circumstances, and that death is therefore the appropriate penalty to be imposed. If you are not persuaded, by a preponderance of the evidence, that the aggravating circumstance

outweighs the mitigating circumstance or circumstances, your personal findings in Section V should be "No". In this weighing process, you must apply your reasoned judgment. You are not merely counting aggravating and mitigating circumstances. Give each circumstance the weight you believe it deserves based on all the evidence. Your determination in Section V must be unanimous. Until all twelve of you agree on whether the answer is "Yes" or "No," do not go on to Section VI.

Now, if you reach a unanimous agreement--and let's just take a look for a second at . . . the conclusion of Section V, and the question . . . "We unanimously find that the State has proven by A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstance marked "Proven" in Section III outweighs the mitigating circumstances in Section IV." And your answer will be either "Yes" or "No."

Now, if you reach a unanimous agreement in Section V, you go to Section VI. If you answered "Yes" in Section V, your sentencing determination in Section VI should be "Death." If you answered "No" in Section V, then enter "Life Imprisonment" in Section VI of the form. This sentencing determination must be unanimous. Each of you must agree on whether the sentence should be life imprisonment or death before that ultimate determination can be entered in Section VI of this form. And as you can see

> at the bottom of the Page 5, pursuant to the instructions that have been given, you will enter either "Death" or "Life Imprisonment."[16]

The jury entered a determination of death on both counts of first degree murder.

Ware contends that the instruction that the court gave was improper because it misled the jury concerning the need for unanimity under Section V. Ware argues that although the jury must unanimously agree that the aggravating circumstances outweigh the mitigating circumstances in order to impose a death sentence, the jury need not unanimously agree that the aggravating circumstances *did not* outweigh the mitigating circumstances in order for the jury to impose a life sentence. Thus, he continues, juries must *not* be instructed that unanimity is required in Section V in order for the jury to impose a sentence of life imprisonment.

The State, on the other hand, argues that the instruction was proper. The State contends that unanimity is required for the jury to impose either a life sentence or sentence of death, and thus it was proper to instruct the jury that they must be unanimous in their sentencing determination. The State relies on decisions of this Court that reject the contention that the inability to agree is itself a verdict, and also relies on this Court's holdings that the jury in a capital sentencing proceeding should not be instructed of the consequences of their inability to agree.

The trial court correctly instructed the jury concerning the unanimity requirement under Section V of the verdict

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[16] The last two paragraphs do not appear in the Maryland Criminal Pattern Jury Instructions.

form; Appellant was not entitled to his requested instruction. Maryland Rule 4-325(c) requires the trial court to give a requested instruction under the following circumstances: (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given. Md. Rule 4-325(c); *Evans v. State, 333 Md. 660, 691, 637 A.2d 117, 132, cert. denied, 513 U.S. 833, 115 S. Ct. 109, 130 L. Ed. 2d 56 (1994).* Ware's requested instruction fails the first part of this test. The requested instruction is not a correct statement of the law because it incorrectly advises the jury that unanimity is not required in order for the jury to impose a life sentence.

Article 27, § 413 governs sentencing procedures in capital cases. Section 413(h) addresses the weighing of aggravating and mitigating circumstances and provides:

> (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the aggravating circumstances outweigh the mitigating circumstances.
>
> (2) If it finds that the aggravating circumstances outweigh the mitigating circumstances, the sentence shall be death.
>
> (3) If it finds that the aggravating circumstances do not outweigh the mitigating circumstances, a sentence of death may not be imposed.

Section 413(i) provides: "The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman." The General Assembly,

in enacting in Article 27, § 413(k)(2), also addressed the eventuality that a capital sentencing jury would be unable to achieve unanimity:

> If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the *court* may not impose a sentence of death.

Article 27, § 413 (k)(2) (emphasis added).

Thus, under the statutory scheme governing capital sentencing, the jury must unanimously decide whether aggravating circumstances outweigh the mitigating circumstances by a preponderance of the evidence.[17] *See* Art. 27, § 413(i); *cf. Harris v. State, 295 Md. 329, 339-40, 455 A.2d 979, 984 (1983)* (noting that sentencing in capital case must be by unanimous verdict of jury). A construction of the statute that did not require unanimity for the sentencing determination would render § 413(k)(2) surplusage. A cardinal rule of statutory construction is to avoid constructions of statutes that render a portion of the statute surplusage. *Gisriel v. Ocean City Election Board, 345 Md. 477, 492, 693 A.2d 757, 764 (1997), petition for cert. filed*, No. 97-5900 (Sep. 8, 1997); *State v. Pagano, 341 Md. 129, 134, 669 A.2d 1339, 1341 (1996); Warsame v. State, 338 Md. 513, 519, 659 A.2d 1271, 1273 (1995); Williams v. State, 329 Md. 1, 19, 616 A.2d 1275, 1284 (1992).* As discussed above, Article 27, 413(k)(2) provides that if the jury, after a reasonable time, is unable to agree on whether death is the appropriate sentence the court may not impose a sentence of

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[17] We note for clarity that the jury is not required to be unanimous in its determination that a mitigating circumstance exists in order to consider that mitigating circumstance in the balancing process. *Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).*

death.[18] If Ware's theory were correct, however, § 413(k)(2) would be entirely unnecessary. If the jury were unable to agree on whether to impose a sentence of death, it would not report that it was deadlocked; instead the jury would enter a sentence of life imprisonment. Under Ware's theory, there could not be a "hung jury" in capital cases, and thus there would be no need for a statutory provision governing the consequences of the jury's inability to agree that a death sentence should be imposed.

The Supreme Court of North Carolina recently addressed a similar instruction requested by the accused in a death penalty case. In *State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (N.C. 1995), cert. denied, 517 U.S. 1110, 116 S. Ct. 1332, 134 L. Ed. 2d 482 (1996),* the defendant contended that the trial court erred by refusing to instruct the jury that it did not need to be unanimous to answer "No" in the section on the North Carolina sentencing form that is nearly identical to Maryland's Section V. *Id. 462 S.E.2d at 38-39.* The North Carolina Supreme Court held that instructing the jury as the defendant wished would "conflict[] . . . with the language of our death penalty statute and will force juries to reach final sentence recommendations of life imprisonment when they are *not unanimous*." *Id.* at 41. The court continued: "Allowing nonunanimous juries to reach final sentence recommendations of life imprisonment is in direct contradiction to our statutory requirement that 'the sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors.'" *Id.*

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[18] A capital defendant is not entitled to an instruction informing the jury of the consequences of its inability to agree. *See Bruce v. State, 328 Md. 594, 622, 616 A.2d 392, 406 (1992); Oken v. State, 327 Md. 628, 642-43, 612 A.2d 258, 264-05 (1992); Calhoun v. State, 297 Md. 563, 594-95, 468 A.2d 45, 59-60 (1983).*

We likewise conclude that the Appellant's requested instruction conflicts with the mandate of § 413(i) that the sentence determination of the jury be unanimous, and consequently, the requested instruction as it pertains to the unanimity requirements under Section V does not constitute a correct statement of the law. In sum, Ware was not entitled to this requested instruction and the given instruction was proper.

Victim Impact Statements

We turn now to Ware's contention that the trial court erred in accepting into evidence written victim impact statements that were submitted by the State's Attorney's Office to the Division of Parole and Probation (Parole and Probation) for inclusion in the pre-sentence investigation.

In accordance with Maryland Code (1957, 1997 Repl. Vol.) Article 41, 4-609(d),[19] Parole and Probation completed a presentence investigation (PSI) in this case, including written victim impact statements from family members of both victims. The PSI stated that "Victim Impact Statements have been acquired by Ms. Cynthia Haworth of the Anne Arundel County State's Attorney's Office and copies of those statements received are attached."

In a pre-trial motion and then again immediately prior to the sentencing phase, Ware attempted to limit written victim impact evidence to those victim impact statements prepared by Parole and Probation, effectively asking to exclude all written victim impact statements from the sentencing hearing. The trial court denied the motion. Ware then attacked the substance of the written victim impact statements because several of them contained the family members' sentencing

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[19] Hereinafter all citations to Article 41 shall be to Maryland Code (1957, 1997 Repl. Vol.) Article 41.

recommendations. The State agreed to redact the portions of the statements in which the family members recommended that Ware be sentenced to death. *See* Art. 27, § 413(c)(iv) ("Any recommendation as to sentence contained in the [PSI] report is not admissible . . . ."). The State also agreed to exclude those victim impact statements prepared by individuals not related to the victims.

Ware contends that the admission of the written victim impact statements violated Article 41, § 4-609(d) and contravened this Court's decision in *Williams v. State, 342 Md. 724, 679 A.2d 1106 (1996).* Before this Court, Ware contends that the statute does not permit the State's Attorney's Office to acquire victim impact statements and then submit them to Parole and Probation for inclusion or incorporation in the PSI. In contrast, the State maintains that the victim impact statements were properly admitted because, although submitted to Parole and Probation by the State's Attorney's Office, the PSI reflects that Parole and Probation accepted the victim impact statements and incorporated them into the PSI.

Article 41, 4-609(d) mandates that Parole and Probation conduct presentence investigations in every case in which the State seeks the death penalty or imprisonment for life without parole. Article 41, 4-609(d) states:

In any case in which the death penalty or imprisonment for life without the possibility of parole is requested under Article 27, 412, a presentence investigation, including a victim impact statement as provided under Article 27, 781 of the Code, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, 412 or 413.

This Court recently construed Article 41, 4-609 in the context of a capital sentencing proceeding. In *Williams,* the

trial court admitted two victim impact statements written by friends and colleagues of the two victims which were not made part of the PSI prepared by Parole and Probation but were instead submitted to the court by the prosecutor independent of the PSI. Victim impact statements were not included in the *Williams* PSI despite 4-609(d)'s mandate that the PSI include victim impact statements. *Williams, 342 Md. at 762, 679 A.2d at 1126.* We agreed with the appellant in *Williams* that it was error to admit the victim impact statements under those circumstances. Judge Chasanow, writing for the Court, explained:

> The only written victim impact statement admissible in a death penalty case is that contained in the PSI prepared by the Division of Parole and Probation and specifically authorized as well as required by 4-609(d). Because the statements written by friends of [the victims] were not included in or incorporated as part of a PSI prepared pursuant to § 4-609(d), they should not have been admitted.

Id. at 763, 679 A.2d at 1126. The Court summarized that "the only written victim impact statements that are admissible in death penalty cases are those made part of a PSI." *Id., 679 A.2d at 1126.*

The trial court satisfied the requirements of 4-609(d) in this case. The PSI clearly reflects that the victim impact statements were included in or incorporated as a part of the PSI. Neither 4-609(d) nor our opinion in *Williams* dictates any particular person or agency as the responsible party for procuring the victim impact statements that ultimately become a part of the PSI. Section 4-609(d) dictates that the PSI shall include a victim impact statement, and *Williams* limits the admissibility of victim impact statements to those "made part" of the PSI. It is clear that a PSI must include a victim impact statement, a PSI is required in death penalty cases, and only those victim impact statements contained in

the PSI may be admitted. The record reflects that those requirements were met in this case, regardless of who actually acquired the victim impact statements and submitted them to the Division of Parole and Probation for inclusion in the PSI.

Demonstrative Evidence

We shall also address Ware's contention that the trial court committed reversible error by preventing Ware from displaying a tire iron[20] as demonstrative evidence. Ware called as a witness Irene Owens, a next-door neighbor of the Gentrys. Owens testified that on the day of the murders she saw Ware near the curb in front of her house picking up an object that was black or brown in color and measuring between twelve and eighteen inches long. At this point in Owens's testimony, Ware sought to introduce a tire iron into evidence. Following the State's objection, the court held a hearing outside the presence of the jury. When asked to describe the object she saw, the witness stated: "I couldn't tell you what it looked like. All I know was long and like a stick. . . . I don't have a clue what it looks like, you know." After the voir dire, the trial court ruled:

Well, I think this witness is a very credible lady. As she said, she's without a clue is what her words were. So I'm not going to let you put that in--that thing in front of her at this juncture.

Ware argued at trial that the tire iron was relevant because it was the defense's theory that Ware never wielded a gun

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[20] The parties and the trial court referred to the object in question by several different names. One witness described the object as one used "to take the tires on and off, you know, to tighten the bolts on the tires." We shall refer to the object as a tire iron.

against Kevin Gentry, but instead wielded a tire iron that he kept in his Jeep. In his initial interview with detectives shortly after he was arrested, Ware told the police that he had thrown a crowbar at Kevin Gentry after Kevin Gentry beat him. Kevin Gentry, however, testified that Ware pointed a gun at him, not a crowbar. The tire iron was later entered into evidence during the testimony of defense witness Antonio Barnes, who testified that the tire iron was substantially similar to one he had seen in Ware's Jeep on two occasions prior to December 30, 1993.

Ware argues that the trial court improperly prohibited him from questioning Owens about whether the tire iron resembled the object she saw, and thereby prevented him from corroborating his assertion that he did not have a gun in his possession on the morning in question, contrary to Kevin Gentry's account of the events. Ware maintains that the tire iron was proper demonstrative evidence, and that this Court has sanctioned the use of demonstrative evidence to illustrate or explain a witness's testimony. In the alternative, Ware contends that the State's cross-examination of Owens "opened the door" to introduction of the tire iron.

Demonstrative evidence has been described as physical evidence that "helps the jurors understand the testimony, but is otherwise unrelated to the case." JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 1101, at 576 (2d ed. 1993); *see, e.g., Grandison v. State, 305 Md. 685, 731-33, 506 A.2d 580, 603-04 (1986); Evans v. State, 304 Md. 487, 520-21, 499 A.2d 1261, 1278-79 (1985).* Demonstrative evidence is generally offered for clarification or illustration of the witness's testimony and it need not be original or authentic. "Instead, the theory justifying admission of these exhibits requires only that the item be sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact." 2 MCCORMICK ON EVIDENCE 212, at 9 (J. Strong 4th ed. 1992).

The decision to admit demonstrative evidence rests within the sound discretion of the trial court. Professor McLain discusses the foundation requirements for demonstrative evidence:

> A foundation simply must be laid through the witness' testimony that *the evidence fairly and accurately depicts what it purports to depict (a subject as to which the witness has the required knowledge)* and that it will be helpful to the witness in explaining his or her testimony. It is then admissible in the trial court's discretion; if the court determines that the evidence will be helpful to the trier of fact, it will allow it.

LYNN MCLAIN, MARYLAND EVIDENCE 403.3, at 310 (1987) (emphasis added). The court must weigh the demonstrative evidence's probative value against the possibility of unfair prejudice or confusion. *See, e.g., Williams, 342 Md. at 737, 679 A.2d at 1114.* The trial judge's determination will not be reversed absent a clear abuse of discretion. *Id., 679 A.2d at 1114.*

We conclude that the trial court did not abuse its discretion in precluding Appellant from introducing the tire iron during the testimony of Irene Owens because Appellant failed to lay an adequate foundation for its introduction.[21] Although demonstrative evidence need not be original in order to be admissible, there must be "ample evidence" that the item offered as demonstrative evidence is substantially similar to the item that actually played a part in the events at

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[21] We also find meritless Appellant's argument that the State during its cross- examination of Irene Owens "opened the door" to introduction of the tire iron. In its short cross-examination of this witness, the State merely asked how long Owens observed Ware in her yard. The State did not probe Owens's inability to identify the object that she saw Ware pick up in her yard.

issue. *Grandison, 305 Md. at 732, 506 A.2d at 603.* In this case, we cannot say that the trial court erred in concluding that there was insufficient evidence of the similarity between the tire iron proffered as demonstrative evidence and the item that Owens saw Ware pick up in her yard. In fact, Owens stated several times that she did not know what the item was nor could she describe the item any more specifically than that it was dark in color and twelve to eighteen inches long. Thus, Ware failed to establish the necessary foundation that the demonstrative evidence accurately represented what it purported to represent. *See State v. United Rwys. Co., 162 Md. 404, 417, 159 A. 916, 919 (1932)* (holding that the trial court did not err in excluding photograph of accident location during testimony of railroad employee who stated that he did not know where the accident occurred).

Impeachment Evidence

We address Ware's final contention that the trial court improperly allowed the State to elicit testimony from witness Antonio Barnes concerning money buried in the backyard of the Gentry residence. Antonio Barnes was Ware's friend and roommate. In response to the State's questions on cross-examination, Barnes testified that he visited Ware at the detention center in mid-August 1995, approximately one month before trial, and Ware told Barnes that there was money buried in the backyard of the Gentry residence in the corner of a flower box. Barnes testified that at first he did not act on this information from Ware, but eventually his curiosity about the buried money made him unable to sleep. Barnes went to the Gentry residence, informed Nina Gentry, Kristi's mother, that there was something buried in her backyard, and asked if he could dig up the flower box. Barnes testified that Mrs. Gentry told him that she would rather not dig up the flower box unless the detectives were present. The police later excavated the flower box as well as

other parts of the Gentry's backyard, but found nothing buried there.

Prior to the State's cross-examination of Barnes, Ware filed a motion in limine seeking to exclude all references to the buried money. The trial court denied the motion. Ware argues before this Court that the discussion concerning the buried money was not probative to show Barnes's bias. Ware further contends that because the evidence suggested that Ware was involved in criminal activity resulting in illicit gains, it was unduly prejudicial.

"Wide latitude must be given a cross-examiner in exploring a witness's bias or motivation in testifying." *Bruce v. State, 318 Md. 706, 727, 569 A.2d 1254, 1265 (1990), cert. denied, 508 U.S. 963, 113 S. Ct. 2936, 124 L. Ed. 2d 686 (1993).* In particular, the cross-examiner must be given latitude to cross-examine a witness concerning any bias or interest the witness may have that would lead the witness to shade his testimony, whether consciously or not, in favor of or against a party. *See Marshall, 346 Md. at 193, 695 A.2d at 190* (holding that the trial court erred in restricting defendant's cross-examination of a witness who had entered into a plea agreement with the State before testifying); *Smallwood v. State, 320 Md. 300, 311, 577 A.2d 356, 361 (1990)* (holding that trial court committed reversible error by precluding cross-examination of Smallwood's girlfriend's bias or interest arising out of two unsuccessful attempts to have Smallwood convicted of other charges); MCLAIN, *supra*, § 607.2, at 43.

"The extent to which a witness may be cross-examined for the purposes of showing bias rests with the sound discretion of the trial judge." *Ebb[v. State], 341 Md. [578] at 587, 671 A.2d [974] at 978.* To be sure, not all relevant impeachment evidence is necessarily admissible, and the trial judge "must balance the probative value of an inquiry

against the unfair prejudice that might inure to the witness." *State v. Cox, 298 Md. 173, 178, 468 A.2d 319, 321 (1983).* We cannot conclude that the balance struck was an abuse of discretion.

The evidence of the buried money was relevant to show Barnes's bias and interest arising out of Ware's efforts to curry favor with Barnes by offering financial rewards. On direct examination, defense counsel established that Barnes and Ware were close friends and that Ware had given Barnes his Jeep Cherokee and allowed Barnes to keep the proceeds from the sale of the Jeep. The State elicited on cross-examination that Ware paid Barnes $ 200 shortly after Ware was arrested to pay for Ware's share of the rent on their shared apartment. Given the history of Barnes and Ware's relationship, the trial court did not abuse its discretion in permitting the State to explore this potential source of bias or interest on cross-examination.

In conclusion, we reverse the judgment of the Circuit Court for Howard County. The message regarding a prosecutor's duty to turn over evidence should be clear:

By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Bagley, 473 U.S. at 676 n.6, 105 S. Ct. at 3380 n.6 (citations omitted). Again, the Supreme Court stated, "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles, 514 U.S. at 419, 115 S. Ct. at 1568.* In the instant case, as the trial judge commented, the prosecutor tacked too close to the wind.

JUDGMENTS REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR HOWARD COUNTY FOR A NEW TRIAL. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

CONCUR BY: BELL

DISSENT BY: BELL

DISSENT:

I concur in and, therefore, join in all but part III A of the majority opinion.

In my opinion, the instruction, at issue in part III A, which the appellant timely requested, is a correct statement of the law; unanimity is an option available to the jury. For my views on that subject, see my dissenting opinions in *Booth v. State, 327 Md. 142, 203, 608 A.2d 162, 192 (1992)* and *Oken v. State, 327 Md. 628, 684, 612 A.2d 258, 286 (1992).*

APPENDIX D

DARRIS ALARIC WARE v. STATE OF MARYLAND

No. 96, September Term, 1999

COURT OF APPEALS OF MARYLAND

September 14, 2000, Filed

JUDGES: ARGUED BEFORE: Bell, C.J.; Eldridge, Rodowsky, Raker, Wilner, Cathell, and Harrell, JJ. Opinion by Raker, J. Dissenting opinion by Bell, C.J.

OPINION BY: Raker

OPINION:

Opinion by Raker, J.

Bell, C.J., dissents

Appellant Darris Alaric Ware was tried by a jury from July 9 to July 22, 1999, in the Circuit Court for Anne Arundel County, and convicted of two counts of first degree murder and related handgun violations. This case is a direct appeal from a sentence of death.[1] *See* Maryland Code (1957,

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[1] In 1995, Appellant was convicted by a jury in the Circuit Court for Howard County of two counts of first degree murder for the murders of Bettina Krista Gentry (Kristi) and Cynthia Allen. The same jury sentenced Ware to death. This Court reversed the convictions and sentence upon direct review. *Ware v. State (Ware I), 348 Md. 19, 702 A.2d 699 (1997).*

1996 Repl. Vol., 1999 Supp.) Art. 27, § 414.[2] We find no errors that tainted the proceedings. Accordingly, we affirm the convictions and the sentence of death.

I.

Ware and Kristi Gentry[3] met and began dating in 1991. Their relationship became serious, and Ware moved into the house in Severn where Kristi lived with her mother, Nina Gentry, in August of 1993. In September of 1993, however, according to Nina Gentry's testimony, the relationship became strained, and Ware moved out.

When we have occasion to refer to several members of the same family, we shall use first names in order to distinguish them from one another.

On December 30, 1993, Nina Gentry returned home from work at midday and found Kristi, then 19, and her friend Cynthia Allen, 22, lying on the floor in the house. Each had been shot in the chest and at point-blank range in the head. Kristi was dead, and Cynthia died later in the hospital. Projectiles fired from a .380 caliber gun were found in the victims' bodies, and .380 caliber shell casings were found on the floor near the victims.

Most of the critical testimony in the case concerned events occurring the morning of the day of the murders, a

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[2] Unless noted otherwise, all subsequent statutory references shall be to Maryland Code (1957, 1996 Repl. Vol., 1999 Supp.) Art. 27.

[3] In *Ware I*, we noted that Ms. Gentry was referred to throughout the record as "Kristi." The transcripts from the second trial consistently spell the name as "Christie." No explanation for the discrepancy appears in the record. For consistency, we adhere to the spelling we used originally.

few hours before Nina Gentry discovered the victims. At approximately 9:00 a.m., Kristi's friend Adrian Washington telephoned Kristi at the house. Adrian testified that Kristi sounded scared and that she abruptly hung up the phone twice. He then received a call from an angry male caller who quickly hung up; Ware's statement to the police indicated that Ware used caller ID to return Adrian's call, and told Adrian not to call the house again. Then, Adrian received a call from Kristi, during which he heard Kristi say, "Darris, I can't breathe. Get off me. You're hurting me."

After this call, Adrian immediately called his brother Thomas Washington, who in turn called the Gentrys' house. Thomas spoke to Ware, and the two argued. Thomas told Ware to stop what he was doing to Kristi, and Ware became angry. Ware asked Thomas whether he "was bulletproof" and threatened to "get [him] and [his] punk-ass brother."

After this conversation, at about 10:00 a.m., Thomas telephoned Kristi's brother Kevin Gentry at his place of employment in Laurel. Along with a co-worker, Kevin then drove to his mother's house, where he confronted Ware, beating him. Afterward, Kevin testified, Ware left the house, went to his car, retrieved a gun and pointed it at Kevin, threatening to kill him. Ware subsequently drove away. When Kevin also drove away to return to work, he came upon Ware returning to the house in his car; according to Kevin, Ware stopped and got out of the car and brandished a gun, as Kevin attempted to run Ware over with his car. Ware escaped harm. Kevin then returned to work in Laurel, arriving there before 12:00 noon.

Deborah Amrhein, a sales clerk at the On Target shooting range and sporting goods store in Severn, told police she saw Ware in the store at about lunch time on December 30. A store manager testified that one box of .380

caliber ammunition of the type and make used by the killer was sold on December 30 at about 12:10 p.m. Neighbors of the Gentrys testified that they saw Appellant arrive back at the house between 12:00 and 12:30 p.m. In his statement to the police, Ware admitted that he owned a .380 caliber handgun. The murder weapon was never found.

At about 12:00 noon, Edward Anderson, an inmate at the Maryland House of Corrections Annex in Jessup and a friend of Kristi, telephoned the house. He spoke to Cynthia, who told him that Ware was in the house and that Kristi and Ware were arguing. Anderson heard Kristi screaming. Then, Anderson heard three gunshots, followed by silence and the sound of someone hanging up the phone. Prison records indicated that this call terminated at 12:31 p.m. Anderson then called neighbors of the Gentrys and asked them to check on the house; neighbor Clyburn Cunningham, Jr. went to the house and rang the doorbell. There was no answer.

Nina Gentry had spoken to Kevin Gentry earlier in the morning when he came, upset, to see her at her workplace, after his encounter with Ware. Some time after noon, she decided to leave work and go to the house. After finding the victims, she called 911. Paramedics and police came to the house. While the police were in the house, Ware called, identified himself, and spoke to police officers. Ware asked if Kristi was there. A police officer asked Ware to come to the house; the officer then departed to look for Ware at an address where he was believed to live. The officer encountered Ware a short distance away, driving toward the house, and arrested him. We will supply additional facts as necessary in discussing the several issues.

Following this Court's reversal of Ware's convictions, he was retried before a jury in the Circuit Court for Anne Arundel County on July 9 to July 22, 1999 and found guilty

of two counts of first-degree murder and two counts of use of a handgun in the commission of a felony. A sentencing proceeding before the same jury was conducted pursuant to 413, and Ware was sentenced to death pursuant to the jury's determination. On August 13, 1999, the court sentenced Ware to a term of ten years for the two handgun convictions, to be served consecutively.

II. Jury Selection Issues

Appellant argues that the trial court committed reversible error during jury selection. He makes three arguments: (a) that the trial judge committed reversible error in denying his motions to strike six prospective jurors for cause; (b) that the trial judge committed reversible error in striking two jurors for cause; and (c) that the trial judge committed reversible error in failing to strike, *sua sponte,* the entire venire panel on the ground that it had been tainted by exposure to media coverage of the case. The State argues that the trial court did not abuse its discretion in ruling on the motions to excuse for cause. As to the court's failure to strike the entire panel, the State maintains that, because this issue was never addressed to the trial court, the issue has not been preserved for appellate review.

A. Denial of Defense Motions to Strike for Cause

The jury selection proceeded in three stages. We glean from the record that, sometime before the trial began, prospective jurors completed a juror questionnaire.[4] The day

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[4] The court and the parties repeatedly refer to a questionnaire which had been [illegible]e-trial to the prospective jurors. Because the court concluded that some of the questions were vague or inartfully drawn, the court engaged in individual voir dire of each prospective juror. We have been unable to locate in the record a copy of the questionnaire.

before the trial began, the prospective jurors were brought before the judge individually for voir dire questioning. Several venirepersons were excused for cause at this time on the basis of the answers to the questionnaires alone. Each party moved to strike certain jurors for cause; some of these motions were granted, while others were denied or reserved. Finally, on the day of trial, the judge allowed renewal of motions to strike for cause that he had previously denied or reserved. The court then proceeded to select the jury, and the parties exercised their peremptory challenges. The defense exercised nineteen of the twenty peremptory challenges permitted by Maryland Rule 4-313(a)(2), and the State exercised the ten challenges permitted by the rule. Each side exhausted its allotted strikes for the alternates.

Appellant argues that the trial court erred in failing to excuse six prospective jurors for cause, specifically, William Cooper, Sean Haynie, Thomas Leising, Joseph Satterthwait, James McLaughlin, and Sirkka Mitchell. As to Mitchell, Leising, and McLaughlin, the answer is simple. The record reflects that the trial court *granted* the defense motions to strike for cause. The trial judge denied the motions initially, but, when Appellant renewed his motions to strike for cause during the final stage of jury selection, the court excused these individuals. The remaining three prospective jurors, Cooper, Haynie, and Satterthwait, did not serve on the jury; Appellant exercised a peremptory challenge to excuse each juror.

We need not decide whether the trial judge erred in declining to excuse prospective jurors Cooper, Haynie, or Satterthwait because, even if there was error, it was harmless beyond a reasonable doubt. *See Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665, 678 (1976).* As noted, Appellant did not exhaust his peremptory challenges. "If disqualification for cause is improperly denied, but the accused has not

exercised all allowable peremptory challenges, there is no reversible error." *White v. State, 300 Md. 719, 729, 481 A.2d 201, 205 (1984).* Additionally, none of the challenged prospective jurors served on the jury; consequently, it is clear beyond a reasonable doubt that any alleged bias and/or knowledge of the case could not have influenced the verdict either as to the conviction or as to the sentence. *Id. at 728, 481 A.2d at 205* (stating that "the claimed bias of [a prospective juror unsuccessfully challenged for cause] did not influence the verdict because [the prospective juror] did not serve on the jury").

B. Granting of Prosecution Motions to Strike for Cause

Appellant argues that the trial court should not have excused prospective jurors Marsha Santo and Donald Rabb for cause. In the case of Rabb, Appellant asserts that he should not have been excused because he indicated that he could put aside his personal reservations about the death penalty and deliberate as required by law. In the case of Santo, Appellant argues that the court erred in not permitting defense counsel to ask rehabilitative questions, and, as a result, the court had insufficient information to determine whether the prospective jurors could follow the law.

Santo and Rabb indicated that they would be unwilling to impose the death penalty. Rabb told the court that he absolutely would not impose the death penalty "where a person went off and there was a love interest involved." The State represents in its brief that Santo "appeared to indicate on her questionnaire that the death penalty should be imposed for every first degree murder, [but] when questioned, she responded that she did not believe she could impose the death penalty under any circumstances."

The Sixth and Fourteenth Amendments to the United States Constitution require that the jury at a capital sentencing proceeding be fair and impartial. *See, e.g., Morgan v. Illinois, 504 U.S. 719, 728, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992); Evans v. State, 333 Md. 660, 668, 637 A.2d 117, 121 (1994).* The proper standard for determining when a prospective juror may be excluded for cause based on his or her views on the death penalty is whether the juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. *See Wainwright v. Witt, 469 U.S. 412, 421, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); Evans, 333 Md. at 671, 637 A.2d at 122.* The decision as to whether to excuse a juror for cause is ordinarily left to the sound discretion of the trial judge and will not be disturbed on appeal except for an abuse of discretion. *See Witt, 469 U.S. at 426* (noting that deference is to be paid to trial judge's decision to strike juror for cause); *Bowie v. State, 324 Md. 1, 20, 595 A.2d 448, 457 (1991)* (same). The trial court is in the best position to assess a juror's state of mind, by taking into consideration the juror's demeanor and credibility.

The responses of jurors Santo and Rabb establish that they could not consider the death penalty under any circumstances. The record supports the trial judge's decision to excuse the prospective jurors for cause based on their opposition to capital punishment. Moreover, as to prospective juror Santo, Appellant acquiesced in the ruling.[5] *See Dietz v. Dietz, 351 Md. 683, 689, 720 A.2d 298, 301-02 (1998); Osztreicher v. Juanteguy, 338 Md. 528, 659 A.2d 1278 (1995); Watkins v. State, 328 Md. 95, 99-100, 613 A.2d 379, 381 (1992); Rocks v. Brosius, 241 Md. 612, 630, 217*

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[5] The relevant portion of the voir dire of Santo and of the subsequent colloquy between counsel and the court follows.

A.2d 531, 541 (1966). The trial court did not abuse its discretion and properly excused both jurors.

[STATE'S ATT'Y:] Okay. Is it your belief that not under any circumstances would you be able to sit on a jury and say that you believe that a person should be sentenced to death?

MS. SANTO: No, I don't feel that I could.

[STATE'S ATT'Y:] Not under any circumstances?

MS. SANTO: No.

[STATE'S ATT'Y:] I don't have any other questions.

THE COURT: Would you wait outside a moment, please, ma'am.

MS. SANTO: Uh-huh.

[STATE'S ATT'Y:] Motion for cause.

THE COURT: The court grants it.

MR. WARREN: Do we even get a chance to explore whether or not she could weigh?

THE COURT: That she what?

MR. WARREN: If she were instructed otherwise. I didn't get a chance to explore whether or not she could--

THE COURT: Her answer--

MR. GUNNING: But I don't think that she would.

MR. WARREN: Okay. *You are right.*

Appellant was *represented* by two attorneys, Gunning and Warren. Warren objected on the ground that if further questioning had been permitted, the witness might have stated her ability to put her personal views aside and abide by the court's instructions. Gunning obviously disagreed. Attorney Warren replied that Gunning was right, and said no more on the subject. This discussion represented agreement by Appellant's attorneys that the judge's ruling was correct. They acquiesced in the ruling.

C. The Court's Failure to Strike, Sua Sponte, the Entire Panel

Appellant next argues that the record establishes that the pool of jurors knew from media accounts that Appellant had been convicted previously and that the jurors had discussed the matter in the courthouse. He maintains that, as a result, the trial court should have struck the entire panel on its own motion. Appellant never objected to the array. Appellant argues that, either as plain error or as coming within the relaxed application of preservation requirements in capital cases, this Court should consider the issue. The State maintains that a review of the record demonstrates no basis for the court to have disqualified the entire array. The State argues that it is unrealistic to expect potential jurors in the county not to have *some* knowledge of the case, particularly a capital case. If counsel believed that the publicity was so pervasive and overwhelming, he could have moved for automatic removal of the case under Maryland Rule 4-254(b).

Maryland Rule 4-312(a) addresses a party's challenge to the array. The rule provides as follows:

A party may challenge the array of jurors on the ground that its members were not selected, drawn, or summoned according to law or on any other ground that would disqualify the panel as a whole. A challenge to the array

shall be made and determined before any individual juror from that array is examined, except that the court for good cause may permit it to be made after the jury is sworn but before any evidence is received.

Because defense counsel did not raise the issue at any time below, the issue is waived. We find no plain error and, accordingly, we reject Appellant's argument that the trial court should have, *sua sponte*, excused the entire panel.

As we have indicated, it appears that a questionnaire was sent to all prospective jurors. On the questionnaire, the prospective jurors were asked about their knowledge of the case from news reports and other sources. It appears that an affirmative questionnaire answer indicating knowledge of the case prompted specific inquiry by the trial court.

Appellant points to the voir dire testimony of fourteen prospective jurors to support his argument that the entire panel was tainted. Upon questioning, prospective jurors Satterthwait, Norwood, Hendricks, Brown, Wilbur, Mitchell, and Bolick said that they had read something in the local newspaper about the case, that Ware had been tried previously, and the conviction reversed. Prospective jurors Pierce, Vanscoy, Matulevich, Stummer, and Levesque heard talk in the courthouse to the same effect. Two of these prospective jurors had heard that Appellant had been sentenced to death. All fourteen individuals stated that their knowledge would not prevent them from judging the case fairly and impartially on the basis of the evidence presented in court alone. Five of the fourteen were stricken for cause, and six others were excused on peremptory challenges. The remaining three prospective jurors, Brown, Levesque, and Vanscoy, served on the jury. Vanscoy was excused before the end of the guilt/innocence phase and was replaced by an alternate; thus, she did not participate in the deliberations or

verdict. Appellant never moved to strike any of these three for cause, and, as noted above, Appellant did not exhaust his peremptory challenges.

Appellant does not appear to be complaining that any of the fourteen jurors were not excused for cause. His complaint appears to be that, based on the voir dire of those jurors, it is evident that the entire panel was tainted and should have been disqualified. The record does not support Appellant's claim.

A criminal defendant's right to a fair and impartial jury is guaranteed by the Sixth and Fourteenth Amendments and Article 21 of the Maryland Declaration of Rights. The Supreme Court has spoken several times to the application of this protection to criminal cases in which the venire has been exposed to pretrial publicity about the case. Juror knowledge of a case *alone* does not make the trial unfair:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). See also Calhoun v. State, 297 Md. 563, 580, 468 A.2d 45, 52 (1983).

This same notion was expressed by the Supreme Court in *Murphy v. Florida, 421 U.S. 794, 800, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).* There, the Court set out the standard for juror impartiality in pretrial publicity cases:

The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. Qualified jurors need not, however, be totally ignorant of the facts and issues involved. . . . At the same time, the juror's assurances that he is equal to [the task of laying aside his impression or opinion and rendering a verdict based on the evidence presented in court] cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.

421 U.S. at 799-800 (citations and internal quotations marks omitted). It is important to "distinguish between mere familiarity with petitioner or his past and an actual predisposition against him." *421 U.S. at 801, n.4.*

In Maryland, we have had a number of occasions, in cases in which pretrial publicity was at issue, to state that a prospective juror is not disqualified automatically by pretrial knowledge of the case or preconceived opinions of the accused's guilt or innocence. Chief Judge Murphy, writing for the Court in *Couser v. State, 282 Md. 125, 138, 383 A.2d 389, 396-97 (1978),* stated:

It is true, of course, that the due process clause of the fourteenth amendment and Article 21 of the Maryland Declaration of Rights guarantee the right to an impartial jury to an accused in a criminal case; these constitutional guarantees do not, however, insure that a prospective juror will be free of all preconceived notions relating to guilt or innocence, only that he can lay aside his impressions or opinions and render a verdict based solely on the evidence

presented in the case. *See Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); Newton v. State, 147 Md. 71, 127 A. 123 (1924); Garlitz v. State, 71 Md. 293, 18 A. 39 (1889).*

Applying these standards, we cannot say on the record before us that Appellant's right to a fair trial was violated by some unknown prospective jurors' purported knowledge of the case derived from pre trial publicity or discussion in the courthouse outside the courtroom. Appellant has failed to satisfy his burden to demonstrate the actual existence of such an opinion in the mind of any juror or such facts in the record as will raise a presumption of partiality. We hold that the trial court did not err in failing to strike, *sua sponte,* the entire jury panel.

III. Trial Issues

A. Admission of Allegedly Irrelevant and Unfairly Prejudicial Testimony

Appellant argues that the trial court erred in admitting irrelevant and prejudicial evidence when it admitted evidence of threats made to two witnesses, Adrian and Thomas Washington, evidence that Appellant had hit Kristi previously, and evidence that Appellant carried a gun. Appellant argues that this evidence was admitted improperly because the evidence was irrelevant, and, even if relevant, its probative value was outweighed by the potential for unfair prejudice. Therefore, the evidence should have been excluded under Maryland Rule 5-403. [6] Because the

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[6] Rule 5-403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *(cont'd)*

evidence here at issue involves, at least arguably, some form of misconduct on the part of Appellant, Rule 5-404(b), the rule excluding so-called bad acts evidence, is also implicated.[7]

1. Testimony that Ware Threatened Thomas and Adrian Washington

On the day of the murders, Thomas Washington, who was the husband of a relative of Kristi Gentry, spoke to Ware by telephone while Ware was at the Gentrys' house. Appellant moved in limine to preclude Thomas from testifying to some statements Ware made in this telephone call. In particular, Appellant sought exclusion of Thomas's proffered statement that Ware had asked Thomas whether he "was bulletproof." Appellant argues that the evidence was irrelevant, that it was at best a threat against Thomas, and that any probative value was outweighed by the prejudice. The trial court denied the motion.

At trial, Thomas testified, and Appellant objected:

[THOMAS:] When we first started conversing it was pretty normal. But towards the end of our conversation it

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(cont'd from previous page)
confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[7] Ruls 5-40(b) reads as follows:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

started getting more aggressive, and he started getting a little bit more boisterous with his attitude toward me, and I was trying to help out my family member.

[STATE'S ATT'Y:] Okay. And how did that conversation end?

[THOMAS:] It ended with him basically asking me was I bulletproof.

[DEF. ATT'Y:] Objection. Move to strike.

THE COURT: Overruled.

[STATE'S ATT'Y:] What did defendant say to you?

[THOMAS:] He asked me was I bulletproof, he told me he knew where I lived and that he basically was going to get me and my punk-ass brother [i.e., Adrian Washington].

[DEF. ATT'Y:] Objection. Move to strike.

THE COURT: Overruled.

We begin our analysis by repeating that the trial court is afforded great deference in its rulings on admissibility of evidence and that rulings as to relevancy will not be disturbed on appeal unless there is a clear abuse of discretion. *See Hopkins v. State, 352 Md. 146, 158, 721 A.2d 231, 238 (1998).* The trial judge's conclusion that Thomas's testimony was relevant is amply supported by the record.

Appellant's statements to Thomas were made approximately three hours before the murders. Thomas's testimony is probative of the proposition that, within the pertinent time frame, Appellant was angry and in a violent frame of mind, and reacted during that time to objects of his

anger with an impulse to shoot them. This proposition is probative of Appellant's motive to kill Kristi. While the testimony may have been prejudicial, it was not unfairly so under the facts of the case. We find no error.

2. Testimony that Ware Had Assaulted Kristi Gentry on a Prior Occasion

Kevin Gentry testified that, three months before the altercation with Ware on December 30, 1993, he had told Ware that "if he ever put his hands on my sister again, I would beat him up." Appellant argues that this testimony was inadmissible evidence of prior misconduct, carried no probative value, and was prejudicial.

After the telephone conversation described above between Thomas and Ware, Thomas telephoned Kevin Gentry, Kristi's brother. Kevin testified as a prosecution witness that, after speaking to Thomas, he drove to the Gentry house, where he confronted Ware, engaged in an altercation with him, and ejected him from the house. The prosecutor asked Kevin, "what prompted you to beat Mr. Ware up in that manner?" The defense objected, and, at the bench, the State argued that the jury should know that Appellant had hit Kristi on a previous occasion, leading Kevin to warn him that he would be beaten if it happened again. The State proffered that the witness would testify that "on a previous occasion there was an altercation, and he told Ware, if you ever lay hands on my sister again, I am going to beat you up without any further conversation." The State argued that without this testimony, it would "look[] like he just went in and beat Ware up for no reason."

The court overruled the objection, concluding that the evidence was not offered for its truth, but simply to show why Kevin acted as he did. The witness told the jury: "If he ever put his hands on my sister again, I would beat him up."

Relying on Rule 5-404(b), Appellant argues that the testimony was irrelevant to any issue in the case, because the action the testimony was meant to justify was itself irrelevant to any issue in the case. He maintains that Kevin Gentry's testimony left the jury to speculate as to what Appellant had previously done to Kristi, when it occurred, and whether it demonstrated a propensity to engage in violence against her.

At the outset, we note that evidence of the deterioration in Ware and Kristi's relationship came from many sources without objection. Several witnesses testified that the arguments between the two had escalated to the point of physical violence.

Kevin had testified that he knew Ware as his sister's boyfriend. When he arrived at the Gentry residence on December 30, 1993, Kevin saw Ware's car. Kevin rang the doorbell and, when Ware opened the door, Kevin began hitting Ware. The testimony in question was offered to explain Kevin's actions. The testimony was relevant to put Kevin's conduct in context. It was not offered for its truth, but simply to show why Kevin acted as he did.

The evidence that Kevin hit Ware the morning of the murders was relevant to show Ware's escalating anger towards Kristi on the day of the murder. In fact, several witnesses testified to this escalating anger and Appellant's build-up of rage towards Kristi. It is the function of the trial judge to assess the probative value of evidence and to weigh the probative value against the prejudicial effect. The trial judge did not abuse his discretion.

3. Testimony that Ware Constantly Carried a Gun

Appellant argues that the trial court erred in admitting testimony of the State's witness, Sean LeBere, that Appellant had a gun and that he always carried it with him. Sean

LeBere was an acquaintance of Ware's for six or seven months preceding the murders. LeBere testified that he saw Ware about two or three days per week during this period. The State asked LeBere, "During the six or seven months before December 30th of 1993, did you ever see the Defendant with a gun?" The defense objected on grounds of relevancy. The State argued that the evidence was relevant because the murders were committed with a gun, which was never found, and the testimony tended to show that Ware possessed a gun. Defense counsel argued that conduct beginning six to seven months before the murders was irrelevant and that "his habits are irrelevant." The court overruled the objection, and, in response to the question of how often LeBere had seen Ware with a gun, LeBere answered, "He always carried one with him."

Although conceding that evidence that he possessed a gun close to the time of the murders was relevant, Appellant argues that evidence that he did so continuously over a period of several months preceding the murders is not relevant and that it violates Maryland Rule 5-404(b). The State argues that LeBere's testimony that Ware always carried a gun was as relevant as the testimony of other witnesses that Ware had a gun a short time before the murders and that, in light of this other unobjected to testimony that Ware carried a gun frequently, any error in the admission of LeBere's testimony was harmless.

Appellant objected below on the grounds that the evidence was irrelevant and that its prejudicial effect outweighed its probative value. Appellant's argument that the evidence ran afoul of Rule 5-404(b) was never made to the trial court and therefore was not preserved. *See Klauenberg v. State, 355 Md. 528, 541-42, 735 A.2d 1061, 1068 (1999)* (holding that a defendant waives the right to argue on appeal that testimony was inadmissible bad acts

evidence when the only objection at trial was on grounds of relevancy).

We hold that the trial court did not err in admitting the testimony. It was relevant to establish that Ware possessed a gun and as evidence of habit that he carried a gun.

Evidence of a person's habit is explicitly deemed relevant by Rule 5-406 to prove action in conformity with the habit:

> Evidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Evidence that a person has a habit of doing something is relevant to show that the person engaged in the conduct on a particular occasion. Here, evidence that Ware was in the habit of carrying a gun made it more likely that he had a gun on the day of the murders. This was habit evidence, admissible under Rule 5-406, and not evidence of a bad act to show character under Rule 5-404(b).[8] There was no error.

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[8] Professor McLain, in her learned treatise on evidence, addresses the acceptable methods of proving habit under Rule 5-406:

> Proof of an individual's habit may be made in three ways: (1) by the individual himself or herself, who has lost his or her memory as to the specific occasion; (2) by another person who has seen the individual take that action on repeated occasions; or (3) by various individuals who have seen the individual take the particular action on different occasions.

5 LYNN MCLAIN, MARYLAND EVIDENCE 406.1, at 402 (1987 & Supp. 1995). Anderson's testimony fell into category (2).

B. Admission of Testimony That Law Enforcement Officials Previously Testified to a Witness's Truthfulness

Ware argues that the testimony of Edward Anderson, a critical witness for the State, that certain law enforcement officials had testified at Anderson's hearing on his motion to reduce his sentence (in an unrelated case) that he had given them truthful information regarding these murders--the same information to which he testified in Ware's trial--was admitted in error. Ware argues that Anderson's credibility was a central issue in this trial and that, when the trial court permitted Anderson's credibility to be bolstered improperly through the opinions of a prosecutor and police detective that Anderson was telling the truth, the trial court committed reversible error.

Anderson, an inmate at the Department of Corrections serving a life sentence at the time of the murders, testified for the State. Anderson testified that he was a friend of Kristi Gentry and that Cynthia Allen was the mother of his child. On the day of the murders, Anderson testified, he had telephoned the Gentrys' house from prison and spoken to Kristi and Cynthia. Anderson testified that Cynthia told him, "Darris is here," and that Ware and Kristi were "fussing." Anderson also testified that he heard Kristi screaming, and then heard three gunshots, followed by silence; afterward, someone hung up the phone on the Gentrys' end.

On cross-examination, Ware's counsel attempted to show that Anderson's testimony was motivated by a desire to obtain leniency in his own case. Anderson testified on cross-examination that, before Ware's first trial, his counsel had filed a motion for modification of his life sentence. He also testified that he brought to the attention of the sentencing judge the fact that he was testifying in the instant case. At the hearing on this motion, Anderson called as witnesses an

Anne Arundel County police detective and a prosecutor from the Anne Arundel State's Attorney's Office to testify regarding Anderson's actions in informing them of the conversation that he had heard on the telephone.

On redirect, the prosecutor inquired further regarding the testimony of the detective and prosecutor at the modification hearing:

[STATE'S ATT'Y:] And, Mr. Anderson, you were present when they testified?

[NDERSON: Yes, ma'am.

[STATE'S ATT'Y:] Okay. And you heard their testimony?

ANDERSON: Yes, ma'am.

[STATE'S ATT'Y:] And can you tell us whether or not they testified to anything other than the facts of what you had testified to?

[DEF. ATT'Y:] Objection as to the characterization of that.

THE COURT: I overrule that. You can answer that.

ANDERSON: *They just testified that I was--that I was being truthful in bringing them this information. That's all.*

Appellant argues that evidence that a prosecutor and a police detective had testified under oath that Anderson "was being truthful" in the information that he presented was improper and highly prejudicial in that it vouched for his credibility and the truth of his testimony. Appellant cites *Bohnert v. State, 312 Md. 266, 539 A.2d 657 (1988),* in

which we held that a social worker's expert testimony that a child was a victim of sexual abuse, supported only by the child's averments, was tantamount to a declaration that the child was telling the truth and the defendant was lying, and therefore invaded the province of the jury. *See 312 Md. at 276, 278-79, 539 A.2d at 662-63.*

It is the law of this State "that a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. Testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law." *Id. at 278, 539 A.2d at 663.* In *Bohnert,* we said:

In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury. *Battle v. State, 287 Md. 675, 685, 414 A.2d 1266 (1980).* Therefore, the general rule is that it is error for the court to make remarks in the presence of the jury reflecting upon the credibility of a witness. *Elmer v. State, 239 Md. 1, 10-11, 209 A.2d 776 (1965).* It is also error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying. *Thompson v. Phosphate Works, 178 Md. 305, 317-319, 13 A.2d 328 (1940); American Stores v. Herman, 166 Md. 312, 314-315, 171 A. 54 (1934)* Court of Special Appeals said in *Mutyambizi v. State* [illegible] *App. 55, 61, 363 A.2d 511 (1976), cert. denied, 279* [illegible] *684 (1977):*

Whether a witness on the stand personally believes or disbelieves testimony of a previous witness is irrelevant, and questions to that effect are improper, either on direct or cross-examination.

Id. at 277, 539 A.2d at 662. *See* JOSEPH MURPHY, JR., MARYLAND EVIDENCE HANDBOOK 603(C), at 250 (3d ed. 1999) (stating that a witness is not permitted "to express an opinion that another person's specific testimony is true or false"). In *Bohnert,* this Court reversed the conviction. *See Bohnert, 312 Md. at 279, 539 A.2d at 663.*

In the instant case, Anderson's testimony that the prosecutor and detective said he was being truthful when he brought information to them was inadmissible. *Bohnert,* however, is distinguishable. In *Bohnert*, the State called a witness before the jury to bolster the credibility of another witness. In this case, we merely have the self-serving statement of the witness saying that others thought he was being truthful. Here we have Anderson basically saying: I am telling you the truth. I am telling you also that two others said I am telling the truth. Although distinguishable from *Bohnert*, we do not think the testimony was proper. Nevertheless, the form of the evidence reduced its prejudicial impact. Anderson made a self- serving statement to the effect that certain persons not present once affirmed, on an unknown basis, his truthfulness in making the statements he again made at trial. Such a statement, by a witness whose credibility is in question, is far less weighty than the expert testimony in *Bohnert*, and its effect on the jury was likely to be insignificant. Moreover, it is implicit that the police believed Anderson or they would not have gone to bat for him at the hearing on his motion to reduce his sentence. Although error, we hold that the error was harmless beyond a reasonable doubt. We are "satisfied that there is no reasonable possibility that the evidence complained of . . . may have contributed to the rendition of the guilty verdict." *Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665, 678 (1976).*

C. Prosecutor's Closing Argument

Appellant next asserts that the trial court erred in permitting improper closing argument. He argues that, in her closing argument to the jury, the prosecutor's argument depended on speculation regarding facts not in evidence and that the court erroneously denied Appellant's request to strike these comments and to instruct the jury to disregard the improper argument.

Jeffrey Allen, Cynthia Allen's husband, testified that Ware came to the Allens' house at about 12:45 on December 30, 1993 and that he had his hands "folded with one hand in his jacket." Ware departed shortly after he arrived. In her closing argument, the prosecutor described the shootings, noting that Cynthia Allen had been on the telephone talking to Edward Anderson. The prosecutor then continued as follows:

But then, one more thought occurs to [Ware]. Who was Cynthia on the phone with when he fired those first shots? Jeffrey? There can't be any witnesses to this crime. I have eliminated Cynthia, I am going to get rid of the gun, but was it Jeffrey on the other end of the phone? Did he hear the gunshots?

What does the Defendant do? He leaves the home. The murders happen at 12:31. We know that is when the phone was hung up. He arrives at Jeffrey Allen's house at about 12:45. Jeffrey Allen doesn't know that there is anything wrong yet.

Defense counsel objected, and a bench conference followed. Defense counsel contended that the State's argument was pure speculation as to what was in Ware's mind at the time he went to the Allen home. He also argued that there was no evidence as to whether Ware had a gun when he went over to

the house. He argued that, since Ware was not charged with any offense against Jeffrey Allen, any reference to eliminating Allen should be stricken and the jury instructed to disregard the comment. The State argued that the comments were an appropriate response to the assertion in Appellant's opening statement that his actions after the crime were consistent with his innocence and that she was entitled to argue about why he went to the Allens' house. The court agreed with Appellant that it would be improper to imply that Ware had his gun in his pocket. The judge said, "I am not going to allow you to say where is his gun, but everything else is okay." The prosecutor resumed her closing argument:

Ladies and gentlemen, the Defendant goes to Jeffrey Allen's house. Jeffrey Allen tells you what he is wearing. The red ski jacket, the blue pants, and he tells you that his hands are in his pocket. Of course, that is significant, ladies and gentlemen.

The Defendant is satisfied that Jeffrey Allen is aware of nothing at that point and he leaves.

Appellant argues that the prosecutor's closing argument was unsupported by the evidence and that the State could not prove that Ware went to Allen's house armed and intending to kill Allen. He maintains that this inference argued by the State was pure speculation about possible other crimes and, as such, was highly prejudicial. The State's threshold position is that the issue is not preserved for our review, because defense counsel did not object after the prosecutor resumed her argument. On the merits, the State argues that the prosecutor never argued or inferred that Ware went to the Allen house to eliminate a witness.

We find that the issue is preserved, and we shall address the merits. Appellant objected to the argument and now

asserts that the trial court erred in failing to strike the argument and to instruct the jury to disregard it.

We begin by noting that, as a general rule, attorneys have great leeway in closing arguments. *See Degren v. State, 352 Md. 400, 429, 722 A.2d 887, 901 (1999).* Attorneys are permitted to comment on the evidence and to state all reasonable inferences that may reasonably be drawn from the evidence. *See Wilhelm v. State, 272 Md. 404, 412-13, 326 A.2d 707, 714 (1974).* This wide latitude, however, is not unlimited and does not include the right to discuss facts not in evidence. *See Degren, 352 Md. at 430, 722 A.2d at 901-02; Collins v. State, 318 Md. 269, 279, 568 A.2d 1, 6 (1990).* On the other hand, discussing facts not in evidence is not necessarily grounds for reversal. Judge Cathell, writing for the Court in *Degren*, noted:

Not every improper remark, however, necessarily mandates reversal, and what exceeds the limits of permissible comment depends on the facts in each case. We have said that reversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused. This determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court. On review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused.

Degren, 352 Md. at 430-31, 722 A.2d at 902 (citations, alterations, and internal quotations omitted). *See also Oken v. State, 327 Md. 628, 612 A.2d 258 (1992); Jones v. State, 310 Md. 569, 530 A.2d 743 (1987), judgment vacated on other grounds, 486 U.S. 1050, 108 S. Ct. 2815, 100 L. Ed. 2d 916 (1988); Reidy v. State, 8 Md. App. 169, 259 A.2d 66*

(1969). "The permissible scope of closing argument is a matter left to the sound discretion of the trial court. The exercise of that discretion will not constitute reversible error unless clearly abused and prejudicial to the accused." *Booth v. State, 306 Md. 172, 210-211, 507 A.2d 1098, 1118, judgment vacated in part on other grounds, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987).*

Although there is no direct evidence regarding Ware's reason in going to Allen's house, the prosecutor recounted facts in evidence. Defense counsel, in his opening statement, argued that Ware's actions on the day of the murders were consistent with innocence. The State was entitled to show, directly or circumstantially, that such was not the case. Ware's appearance at the Allen house could have been construed as circumstantial evidence supporting the theory that he went there to cover up the crime. We find no error.

D. Exclusion of Testimony of Antonio Barnes

Appellant argues that the trial court erred when it sustained the State's objection to the testimony of Appellant's roommate, Antonio Barnes, that Appellant instructed Barnes to tell Kristi Gentry that Appellant was on his way to the Gentrys' house shortly before the murders. Appellant argues that the statement was not hearsay and was admissible as inconsistent with a premeditated intent to murder Kristi.

Antonio Barnes was called as a State's witness and testified on direct examination that he had known Ware for a couple of years and became his roommate in October, 1993. Barnes also testified on direct examination to Ware's possession of a gun and to the search of their apartment after the shootings. On cross-examination by Ware's counsel, Barnes said that around midnight on the night of December 29, 1993, he received a phone call from Kristi. Barnes agreed to tell Ware that she had called.

When the State concluded its examination of Barnes, defense counsel informed the court that Barnes was to be recalled as a defense witness. As a courtesy to Mr. Barnes, the court permitted the defense examination of Barnes, out of turn, and in the State's case-in-chief. Barnes testified that he saw Ware at about 11:30 a.m. on December 30, 1993, when Ware returned to the apartment to change his clothing. As Ware left the apartment, he gave instructions to Barnes. The State objected when defense counsel asked Barnes to relate the instructions he had given to him. Defense counsel proffered that Barnes would testify that *Ware told him to tell Kristi, if she called, that he was on his way over.* Defense counsel argued that the State would be introducing evidence that would make Barnes' testimony relevant. The trial judge stated that, since Barnes had been called out-of-turn and during the State's case, he did not know what the State was going to offer. The judge sustained the objection, ruling that Ware could recall Barnes as a witness later.

Trial judges have broad discretion in determining the order of presentation of evidence.[9] *See McCray v. State, 305 Md. 126, 133, 501 A.2d 856, 860 (1985)* (recognizing that "trial judges have broad discretion in the conduct of trials in such areas as the reception of evidence"). In sustaining the State's objection, the trial court properly exercised its discretion. The court merely excluded this evidence until a

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[9] Maryland Rule 5-611(a) requires trial judges to manage the order of presentation of evidence:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

later point in the trial; defense counsel never re-offered the testimony. We perceive no abuse of this discretion.

Appellant's sole argument before this Court is that the trial court erroneously excluded the testimony on hearsay grounds. Appellant is wrong in concluding that hearsay was the basis for the court's ruling. In fact, the judge never ruled that the evidence was inadmissible per se. The court merely ruled that it was irrelevant when offered.

The trial judge properly exercised his discretion in ruling that, when Appellant offered the evidence, it was not relevant and that Appellant could recall the witness at a later point in the trial. The discretion to vary the usual order of proof is well within the trial court's discretion. *See, e.g., McCray, 305 Md. at 133-34, 501 A.2d at 860; State v. Hepple, 279 Md. 265, 270-71, 368 A.2d 445, 449 (1977).* The judge had varied the order of proof in permitting the direct examination of Barnes by the defense during the State's case in chief. In sustaining an objection to part of the testimony, the judge properly exercised his discretion in controlling the order of proof, thereby permissibly requiring Ware to recall the witness later in the trial if he so desired. Nothing prevented Ware's counsel from recalling the witness. We find no error.

E. Evidence of Ware's Demeanor While Giving a Statement to the Police

Appellant argues that the testimony of a police officer that Appellant "would . . . sweat, . . . tense up in his chair and . . . try to push himself away from me and . . . choke a little when he spoke" during his interrogation was irrelevant and implied that Appellant was being untruthful when he was being questioned about the shootings. He argues a violation of due process. The State argues that the officer's

testimony was nothing more than his observations of Ware during the interview.

Officer Michael Praley testified for the State regarding the statement that Appellant made to him the on the day of the murders. In response to the prosecutor's question about Ware's demeanor, the officer responded:

He was calm. But at times there was a--during my hours of interviewing him, the rhythm of questions leading to him shooting both these girls, I observed that he would--he would sweat, that he would tense up in the chair and that he would try to push himself away from me slightly and that he would choke a little as he spoke. * * * Like he would--in his voice would be a rasp and a choke and the words that he would speak.

The officer said that he noted these observations when he questioned Ware specifically about the shooting, but that Ware was calm when he discussed matters that happened the night before the shootings.

Officer Praley testified to his observations of Ware's physical appearance and manner of speaking; he never expressed an opinion as to Ware's truthfulness. There were no accusations of lies or inconsistencies. As to Ware's demeanor, the significance was for the jury to assess. We perceive no error.

IV. Sentencing Phase

A. Evidence of Victims' Families' Opposition to Death Sentence

Appellant proffered evidence that some of the victims' family members did not wish to see a death sentence imposed because of the anxiety and uncertainty that would

result from the possibility of a future successful attack upon the sentence. The trial court ruled that the evidence was not relevant and hence inadmissible. We agree.

Appellant argues that the evidence was admissible for two purposes. First, he argues that it was admissible as a potential mitigating circumstance under 413(g)(8), the catch-all provision, and may not be restricted under the Eighth Amendment to the United States Constitution. Second, he argues that it was admissible to respond to the victim impact evidence introduced by the State. His theory is that victim impact evidence may establish that a family member is plagued by grief, fear, and anxiety. Evidence that a family member opposes a death sentence is directly responsive because of its tendency to show that at least some of these emotions may be reduced in intensity or severity by a sentence of life without parole.

In *Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978),* the United States Supreme Court held that a jury should "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." A plurality of the Court also noted that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id. at 605 n.12.*

Victim impact evidence is admissible during capital sentencing. The United States Supreme Court held in *Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991),* that admission of victim impact evidence during capital sentencing does not violate the Eighth Amendment. The Court held that "victim impact evidence is simply

another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a type long considered by sentencing authorities." *501 U.S. at 825.* The sentencing authority, however, may not consider statements of the victim's family that amount to an opinion regarding the appropriate sentence to be imposed upon the defendant. *See Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), overruled in part on other grounds, Payne v. Tennessee, 501 U.S. at 830 & n.2.*

In overruling *Booth,* the Supreme Court in *Payne* did not disturb the Eighth Amendment proscription against the introduction of victim statements that the death penalty should be imposed.[10] *See Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991); State v. Hoffman, 123 Idaho*

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[10] The Supreme Court of Alabama, in *Ex parte McWilliams, 640 So. 2d 1015, 1017 (1993),* discussed the effect of *Payne v. Tennessee* on the Court's ruling in *Booth v. Maryland,* concluding that *Payne* only partially overruled *Booth.* The court stated:

> In *Booth v Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987)* the United States Supreme Court vacated a death sentence, holding that it violated the defendant's Eighth Amendment rights for the sentencer to consider victim impact statements in sentencing the defendant to death. The victim impact statements in that case contained the same types of information as were in the statements in the present case. In *Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991),* the Supreme Court partially overruled *Booth.* The court in *Payne* held that the defendant's Eighth Amendments rights were not violated by the trial court's consideration of statements regarding the victims and the impact of their deaths upon the family members. The victim impact statements in *Payne* did not contain characterizations or opinions about the defendant, the crime or the appropriate punishment. That portion of *Booth* that proscribed the trial court's consideration of that type of statement was therefore left intact by *Payne.*

638, 851 P.2d 934, 941 (Idaho 1993); State v. Muhammad, 145 N.J. 23, 678 A.2d 164, 172 (N.J. 1996); State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245, 269 (Wash. 1995).

In *Robison v. Maynard*, the United States Court of Appeals for the 10th Circuit held that "the opinion of a relative of a victim is irrelevant to the jury's determination of whether the death penalty should be imposed." *943 F.2d at 1217.* The court concluded that such testimony is "calculated to incite arbitrary response" from the jury. *Id.* Interpreting *Payne*, the 10th Circuit stated:

Payne merely put aside the bar to the introduction of and comment upon victim impact evidence which had been created in *Booth [v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987)]* and *South Carolina v . Gathers, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989).* The Court did not expand the universe of admissible relevant mitigating evidence established by *Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978),* and *Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)* . . . . We cannot agree that *Payne* portends admissibility of any evidence other than that related to the victim and the impact of the victim's death on the members of the victim's family. Nothing said by the Court suggests the Court intended to broaden the scope of relevant mitigating evidence to include the opinion of a victim's family member that the death penalty should not be invoked.

Id.

The Maryland General Assembly has exercised its prerogative to permit victim impact evidence by requiring the Department of Parole and Probation to prepare a pre-sentence investigation report for consideration by the judge or jury at sentencing. *See* Maryland Code (1957, 1997 Repl. Vol., 1999 Supp.) Art. 41, 4-609(d). By statute, a victim

impact statement must be included in this report. *See* Maryland Code (1957, 1996 Repl. Vol., 1999 Supp.) Art. 27, 781; *Evans v. State, 333 Md. 660, 685, 637 A.2d 117, 130 (1994).*

Section 413(g) addresses mitigating factors. The statute enumerates seven statutory mitigators, and an eighth "catch-all" provision, providing as follows:

If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson in the first degree, escape in the first degree, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, carjacking or armed carjacking, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

Section 413(g). Appellant relies on the Section 413(g)(8) mitigator, the so-called catch-all mitigator. A Section 413(g)(8) mitigator is "anything relating to the defendant or to the crime which causes [the jury or any of its individual members] to believe that death may not be appropriate." *Harris v. State, 312 Md. 225, 253, 539 A.2d 637, 651 (1988)* (quoting *Mills v. State, 310 Md. 33, 51, 527 A.2d 3, 11 (1987), judgment vacated on other grounds, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988))*. In addition, the judge or jury, as the sentencing authority, is free to include as mitigating circumstances "any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." *Tichnell v. State, 287 Md. 695, 734, 415 A.2d 830, 850 (1980).* We reiterated this holding in *Calhoun*, pointing out that, under the Maryland statute, "the sentencing authority may articulate any factor it

finds in mitigation." *297 Md. 563, 637, 468 A.2d 45, 81 (1983).*

In addition to a victim impact statement included in the pre-sentence report, a victim's family member may testify orally at sentencing. *See* 780(a).[11] The "permissible scope of victim impact testimony . . . lies within the sound discretion of the presiding judge, as limited by Md. Code (1957, 1996 Repl. Vol.), Art. 27, 413(c)(1)(v)." *Ball v. State, 347 Md. 156, 197, 699 A.2d 1170, 1189-90 (1997).* Admissible evidence is any "evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."[12] 413(c)(1)(v).

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[11] Article 27, 780(a) provides as follows:

> In every case resulting in serious physical injury or death, the victim or a member of the victim's immediate family ... may, at the request of the State's Attorney and in the discretion of the sentencing judge, address the sentencing judge or jury under oath or affirmation before the imposition of sentence.

[12] Section 413 provides as follows:

> The following type of evidence is admissible in this proceeding:
>
> (i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;
>
> (ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to 412(b) of this article;
>
> (iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;
>
> *(cont'd)*

The trial judge did not abuse his discretion in excluding the testimony that the victim's family did not wish a death sentence imposed. Opinions that Appellant should not receive a sentence of death have no bearing as to defendant's character, prior record, or the circumstances of the offense. They do not qualify as victim impact evidence or rebuttal thereto. Such evidence has no bearing on the actual harm caused by the particular crime. The testimony does not constitute mitigating evidence under the Maryland statute. Because the proffered evidence concerned the appropriate sentence to be imposed on Appellant, it was excluded properly by the trial court. We hold that the trial court did not err by excluding evidence of the victims' families opinion on the death penalty because it was not relevant, even under a loose evidentiary requirement of relevance. The trial court did not exclude evidence of a mitigating circumstance in violation of the Eighth Amendment.

Other jurisdictions that have considered the admissibility of such evidence have reached the same conclusion. *See, e.g., Robison v. Maynard, 943 F.2d 1216, 1217-18 (10th Cir. 1991)* (upholding exclusion of victim's sister's testimony that she opposed death penalty as not relevant to mitigation), *superseded by statute, OKLA. STAT. tit. 22 984* (evidence admissible by statute); *Barbour v. State, 673 So. 2d 461, 468-69,* (Ala. Ct. Crim. App. 1994) (holding that a letter

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> (iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and
>
> (v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.
>
> 413(c)(1).

from the victim's brother requesting that defendant receive life without parole was properly excluded since, under *Eddings,* this evidence was not relevant to any mitigating circumstance because it did not pertain to defendant's character, record, or the circumstances of the offense); *Floyd v. State, 569 So. 2d 1225, 1230 (Fla. 1990)* (finding no abuse of discretion in excluding victim's daughter's testimony that defendant should not be executed); *State v. Clark, 1999 NMSC 35, 990 P.2d 793, 805-06, 128 N.M. 119 (N.M. 1999)* (upholding exclusion of clergymen's testimony regarding religious doctrine and opinions about the death penalty); *State v. Bowman, 349 N.C. 459, 509 S.E.2d 428, 440 (N.C. 1998)* (upholding exclusion of victim's mother's testimony expressing ambivalence about imposition of the death penalty because not evidence of mitigating circumstance since it had nothing to do with defendant's character, record, or circumstances of offense and did not reduce moral culpability of the killing); *State v. Wright, 323 Ore. 8, 913 P.2d 321, 324-27 (Or. 1996)* (upholding exclusion of opinions as to whether defendant should receive death sentence because not relevant to any mitigating circumstance); *State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245, 268-69 (Wash. 1995)* (upholding exclusion of victim's essay stating general opposition to death penalty because essay not mitigating evidence and not pertinent to an extenuating circumstance or to defendant's moral culpability).

B. Jury Instruction Regarding Youthful Age of the Defendant as a Mitigating Factor

Appellant argues that the jury instruction concerning the mitigating factor of the youthful age of the defendant was inadequate, in that the instruction may have left the jury with the impression that youthful age meant chronological age only. Appellant failed to request the instruction that he now requests and never objected to the instruction regarding

youthful age that he now claims was error. Where there has been no timely objection to the giving of or failure to give an instruction, the issue is not preserved. *See* Maryland Rule 4-325 (e); *Richmond v. State, 330 Md. 223, 235, 623 A.2d 630, 636 (1993).* The issue is waived. *See* Maryland Rule 8-131; *State v. Tichnell, 306 Md. 428, 465-66, 509 A.2d 1179, 1198 (1986); Foster v. State, 305 Md. 306, 316, 503 A.2d 1326, 1331 (1986).* We find no plain error.

Section 413(g) provides that, if the jury or court considering a death sentence finds beyond a reasonable doubt that an aggravating circumstance exists, then it must consider whether any mitigating circumstances exist. The statute sets out a non-exclusive list of possible mitigating circumstances. Section 413 (g)(5) states as a statutory mitigator: "The youthful age of the defendant at the time of the crime." In explaining the sentencing form to the jury, the judge said: "For the purposes of the sentencing procedure, a mitigating circumstance is anything about the Defendant or the facts of this case that, in fairness or in mercy, may make the death sentence an inappropriate penalty for the defendant." The court identified the mitigating circumstances for the jury, and in regard to youthful age, stated: "Five, the youthful age of the Defendant at the time of the crime." At the conclusion of the jury instructions, both sides told the court, at the bench, that there were no objections to the instructions as given.

Appellant, who was 22 years old at the time of the murders, argues that the youthful age mitigator in Maryland includes many factors other than chronological age, *see, e.g., Johnson v. State, 348 Md. 337, 353-54, 703 A.2d 1267, 1275 (1998),* and that, without an explicit instruction regarding these other factors, the jury would likely assume that "age" means chronological age only. Appellant introduced the videotaped deposition of expert Laurie James Monroe as

evidence of his background and upbringing. He argues that, if given a more detailed instruction, the jury could have considered this evidence, as well as Appellant's lack of experience with the criminal justice system and his "poor anger control evidencing immaturity," when deciding whether the mitigating circumstance of youthful age existed. Finally, Appellant argues that, despite the lack of objection, the sentence should be reversed because the instruction as given was plain error. We disagree.

It is well settled in Maryland that youthful age as used in this statute includes considerations other than mere chronological age, *see Johnson, 348 Md. at 353-54, 703 A.2d at 1275; Lovell v. State, 347 Md. 623, 659-60, 702 A.2d 261, 279 (1997),* but instructions on mitigating circumstances for purposes of capital sentencing proceedings are not excepted from the general rule that a party must request a specific instruction before a court is required to give it. Appellant does not contend that the instruction as given contained any misstatement, but only that the instruction "provided the jury with no guidance in assessing the existence *vel non*" of the youthful age mitigator. "The constitutional standard for reviewing an allegedly ambiguous jury instruction is 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Booth v. State, 327 Md. 142, 162, 608 A.2d 162, 171 (1992)* (quoting *Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)).*

It is clear from a review of the closing arguments of the State and Appellant that the jury was not misled into believing that the statutory mitigator of youthful age was limited to chronological age only. The State, in closing, conceded that the defendant's age of twenty- two "is not extremely old or very old in terms of chronological age." The

prosecutor then went on to argue the maturity of Ware, his actions in the military and service in Desert Storm, and the cold and calculating nature of the crime as evidence of maturity. In response, as to youthful age, defense counsel argued the immaturity of Appellant and that he was "acting out of youth, out of the impetuousness of youth."

A court's obligation to give any particular instruction in a criminal case is governed by Maryland Rule 4-325. Rule 4-325(c) provides:

The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Rule 4-325(e) deals with objection and the right to assign error in connection with jury instructions:

No party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

We have long interpreted these rules and their predecessors to mean that a court does not err when it omits an instruction or, in this case, further amplification, that was never requested.

The Supreme Court has established, in capital sentencing proceedings, "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence, and that the State may structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to it." *Weeks v. Angelone, 528 U.S. 225, 120 S. Ct. 727, 732, 145 L. Ed. 2d 727, 68 U.S.L.W. 4060 (2000).* In Ware's case, the jury was explicitly instructed to consider youthful age as a mitigating factor. The instruction given by the trial court was a correct statement of the law, and the jury did not ask for any supplemental instruction as to the meaning of youthful age.[13] There is no reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence of the statutory factor of youthful age. *See Buchanan v. Angelone, 522 U.S. 269, 276, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998);*

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[13] Subsequent to this Court's opinion in *Lovell v. State, 347 Md. 623, 702 A.2d 261 (1997),* the Maryland State Bar Association, Inc., Criminal Pattern Jury Instruction (MPJI-CR) 7:00, addressing the mitigating circumstance of youthful age, was revised to read as follows:

> (5) The youthful age of the defendant at the time of the crime. A defendant who is under the age of 18 at the time of the crime cannot be sentenced to death. Youthful age is a flexible and relative concept and is not measured solely by chronological age. Youth, in its ordinary meaning, is equated with immaturity. It is for you to determine if the defendant, who was (age) at the time of the crime, was of youthful age. In making that determination, you should consider such factors as the defendant's chronological age, mental development, learning, and life experience, as they bear on the defendant's degree of maturity.
>
> *See* MPJI-CR 7:00 (1986, 1999 Supp.).

We strongly recommend that trial judges' instructions on youthful age include the more expanded explanation of youthful age.

Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). There was no error.

C. Jury Sentencing

Appellant argues that the trial court erred in failing to take remedial action when Appellant elected to be sentenced by the jury despite his counsel's strong recommendation that he be sentenced by the court. Just before the sentencing hearing began, defense counsel told the court that counsel and Appellant disagreed as to the choice of the sentencing authority. Appellant argues that, under the circumstances, the court was obliged, *sua sponte,* to make an adequate inquiry of Appellant to ascertain that he was competent to make the decision to be sentenced by a jury, one that was against his counsel's recommendation. He also argues that, because he elected to be sentenced by a jury, against the advice of his counsel, and because he disagreed with his counsel about the advisability of being sentenced by the jury, the court should have conducted a hearing to determine whether counsel could continue to represent him. At a minimum, Appellant argues, the court should have granted him a postponement to allow his counsel to prepare for a jury sentencing. It is the State's position that the record demonstrates clearly Ware's competency, despite the strategic dispute with his attorneys, and that there was no need for the court to take any further action with respect to Ware's competency to elect the mode of sentencing.

On the day the sentencing proceeding began, Appellant was questioned by his counsel regarding his election to be sentenced by the jury:

[DEF. ATT'Y:] Mr. Ware, we have had an opportunity to discuss this matter at length on many occasions. We are now at the stage of these proceedings where the sentence or--there is going to be--a sentencing determination is going to

have to be made. You have been found guilty of two counts of first degree premeditated murder, and as a result the State is seeking to have a death sentence imposed.

Basically whatever sentencing authority--whatever authority sentences you, will have three options available to them. They will have the option of life, life without the possibility of parole and death.

You have to make the decision as to which authority you want to sentence you. In other words, you can be sentenced by the same jury that has found you guilty at the guilt/innocence stage, or you can elect to waive your right to a jury sentencing and present your mitigation and agree to have Judge Thieme basically be the sentencing authority. Do you understand that?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Now, we have had an opportunity to discuss this issue of how to proceed on sentencing on many occasions. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] We have discussed it--well, I have been in the case since last October, October of last year. But before I got in the case, you also discussed the issue of how you wanted to proceed at the time of sentencing with Mr. Wachs, who was your prior attorney, and Mr. Gunning. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] And during all of those previous discussions, the discussions you had with Mr. Wachs and the discussions you had with Mr. Gunning and the discussions

that you had with me, up until yesterday you had indicated that you believed that it would be in your best interest to proceed by way of court sentencing. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] And we discussed the pros and cons and the advantages and disadvantages to proceeding by way of a jury sentencing versus a Court sentencing. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Now, yesterday you--well, before I get to yesterday, we had been preparing on the basis of your representations and our conversations. We have been preparing--if we got to this phase, we had been preparing to proceed by way of a Court sentencing up until yesterday. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] And that was based on our discussions and your indications to us as to how you wanted to proceed. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Yesterday, you expressed your decision or your feeling that you wanted to proceed by way of a jury sentencing. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] And we discussed that for a long time yesterday, didn't we?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Over two hours?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] And we strongly urged you to waive your right to jury sentencing and proceed by way of a Court sentencing. Isn't that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] And in spite of our lengthy conversations and our virtual prayers to you to proceed by way of a Court sentencing, you indicated that you wanted to proceed by way of a jury sentencing. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Once again, just to make it clear, and that was against our advice?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Okay. The decision is yours. We can't tell you what to do. The final decision is yours. So, we can't sit here and tell you you have to have Court or you have to have jury sentencing.

But I have to let you know, after consulting with colleagues in the office, it is our belief that we should, under these circumstances, really disregard your election and decide to proceed by way of a Court sentencing anyway. Do you understand that?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] The final decision is going to be up to Judge Thieme as to who wins out in this, because basically we are at the point now where we are not on the same page.

Up until yesterday we were on the same page, that we were going to do the court sentencing. Correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Okay. I am going to have to ask you to keep your voice up so you answers can be heard. Okay?

And yesterday, we realized that our paths were no longer--that our paths had separated. Is that correct?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] So now, we are in the position of you stand before Judge Thieme and you say, Judge, I want a jury sentencing. Is that what you are saying?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Against the pleas of my counsel?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] We are standing in front of Judge Thieme saying, Judge he doesn't know what he is doing. He can't be in his right mind. If he wants a jury sentencing, disregard what he wants to do, accept our election to allow this matter to be heard before the Court and allow us to waive the jury sentencing portion. Do you understand that we are differing on that?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Do you understand that His Honor is going to make the final decision about that, in terms of who wins in this battle?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] Okay. Once again, Mr. Ware, we have gone over your age and the fact that you have never been in a mental institution or the care of a psychiatrist. We did that yesterday with your election not to testify.

Are you under the influence of any drugs, alcohol or any other substance that would prevent you from understanding what is going on here today?

DEFENDANT: No sir.

[DEF. ATT'Y:] Has anyone forced you to do this? Well, strike that. This is where we are, Your Honor. An impasse.

The judge then addressed Appellant, and the following colloquy ensued:

THE COURT: Mr. Ware, let me tell you what the law of this State is, and I am quoting from *Gilliam v. State, 331 Md. 651, 629 A.2d 685,* and I am quoting directly. "Election of a court or jury trial and/or sentencing is a decision for the defendant."

Regardless of what your attorneys think they are going to do, the decision is yours, and I will abide by your decision. What do you want?

DEFENDANT: Jury.

THE COURT: That ends it.

[DEF. ATT'Y:] Yes.

When the attorney for the State began to take issue with the suggestion that Ware must not be in his right mind, defense counsel retracted this assertion:

[STATE'S ATT'Y:] Your Honor, if I may? If you could, just based on some of the things that [defense counsel] said regarding it is their position that Mr. Ware must not be in his right mind, that he doesn't understand what's going on, if the Court would inquire as to any condition he may have, which would indicate that he is not in his right mind or--

THE COURT: Did you understand what was happening this morning, Mr. Ware?

DEFENDANT: Yes, sir.

[DEF. ATT'Y:] And also, I understand [State's Attorney's] concern. I took some license with the language that I was using. I don't mean to imply any--

THE COURT: I understood from the standpoint of trial strategy.

[DEF. ATT'Y:] Exactly. *I am not implying that--*

THE COURT: But let's make--

[DEF. ATT'Y:] *--he is not capable or competent to make the decision.*

The court made further inquiry, as follows:

THE COURT: Do you understand what was said this morning?

DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about what your counsel has asked you?

DEFENDANT: No, sir.

THE COURT: You obviously had a jury the first time this case went to trial. So I assume you know about your rights for a jury or non-jury regarding the sentencing phase.

DEFENDANT: Yes, sir

THE COURT: And did Judge Sweeney go through it before you in Howard County in the prior trial?

DEFENDANT: Yes, sir.

THE COURT: All right. Is there anything that you want to ask me about what counsel has asked you?

DEFENDANT: No, sir.

THE COURT: Do you want to consider it further?

DEFENDANT: No, sir.

THE COURT: Does the State have any further inquiries you want me to make?

[STATE'S ATT'Y:] Your Honor, just for the record. I know it was on there yesterday.

THE COURT: Go ahead.

[STATE'S ATT'Y:] Has Mr. Ware--have you now or have you ever been a patient in a mental institution or under the care of a psychologist or a psychiatrist?

DEFENDANT: Never.

Subsequently, Appellant's counsel requested a postponement of the sentencing proceeding until mid-September, partly on the basis of Appellant's last-minute

decision to be sentenced by the jury. The court denied the request for postponement.

Criminal defendants have a Fourteenth Amendment due process right not to be tried when they are incompetent. *See Thanos v. State, 330 Md. 77, 84, 622 A.2d 727, 730 (1993).* In *Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975),* Chief Justice Burger, writing for the Court, explained:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.

Implementing the Supreme Court standard, Maryland Code (1982, 1994 Repl. Vol., 1999 Supp.) 12-103(a) of the Health-General Article specifies:

> If, before or during a trial, the defendant in a criminal case appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial.

The Code defines "incompetent to stand trial" as "not able: (1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." *Id.*, 12-101(e). As we noted in *Thanos*, "[a] defendant must, in other words, have 'present ability to consult with his lawyer with a reasonable degree of rational understanding--and . . . a rational as well as factual understanding of the proceedings against him.'" *Thanos, 330 Md. at 85, 622 A.2d at 730* (quoting *Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)).*

A defendant is presumed to be competent to stand trial. *See e.g. Colbert v. State, 18 Md. App. 632, 641, 308 A.2d 726, 731 (1973).* However, 12-103(a) of the Health-General Article places a duty on the trial court if, during trial, a defendant appears to the court to be incompetent or the defendant alleges incompetency to determine whether the defendant is in fact competent to stand trial. The court's duty is triggered in one of three ways: (1) upon motion of the accused; (2) upon motion of the defense counsel; or (3) upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial. *See Johnson v. State, 67 Md. App. 347, 358-59, 507 A.2d 1134, 1140 (1986).* In addition, we have held that "a finding of competency to stand trial does not automatically result in a conclusion that an accused is also competent to waive substantial rights, such as the right to plead not guilty, the right to a jury trial, and the right to assistance of counsel." *Mann v. State's Attorney for Montgomery County, 298 Md. 160, 169, 468 A.2d 124, 129 (1983).*

Under 413(b), sentencing shall be by jury and, if waived, before the court alone.[14] *See Bruce v. State, 328 Md. 594,*

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[14] Section 413(b), governing the determination of the sentencing authority in a death penalty sentencing proceeding, provides as follows:

> This proceeding shall be conducted:
>
> (1) Before the jury that determined the defendant's guilt; or
>
> (2) Before a jury impaneled for the purpose of the proceeding if:
>
> (i) The defendant was convicted upon a plea of guilty;
>
> (ii) The defendant was convicted after a trial before the court sitting without a jury;

(cont'd)

602, 616 A.2d 392, 396 (1992). Whether a defendant is to be sentenced by the court or the jury is a decision for the defendant. *See* Maryland Rule 4-246; *Gilliam v. State, 331 Md. 651, 670, 629 A.2d 685, 694 (1993); Bruce, 328 Md. at 602-07, 616 A.2d at 396-98.*

Ware argues that the absence of a record demonstrating a competent basis for his eleventh hour decision to elect a jury sentencing despite his attorneys advice to the contrary obligated the court to conduct, *sua sponte*, a competency examination. Ware's entire argument appears to be that the court must inquire, *sua sponte*, into the competency of a defendant, based solely on a defendant's election to be sentenced by a jury, when the choice is contrary to the recommendation of his counsel. His argument is meritless. Where there is no independent reason to question or doubt defendant's competency, no hearing or inquiry is required. *Cf. State v. Cowans, 87 Ohio St. 3d 68, 717 N.E.2d 298, 311 (Ohio 1999).*

We had occasion to discuss the trial court's obligation to inquire, *sua sponte,* into a defendant's competency in *Thanos*. Thanos was convicted of first-degree murder and sentenced to death. Over the objection of his counsel, he waived a jury on the guilt/innocence stage and the sentencing. *See Thanos, 330 Md. at 84, 622 A.2d at 730.* On appeal, as to his

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(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

competency to waive a jury, he argued that he was not competent to make the decision to waive a jury trial and that the court should have deferred to his attorney's preference for a jury trial. His back up argument was that, even if the choice to waive a jury trial and jury sentencing were his to make, he did not do so knowingly, voluntarily, or intelligently. Thanos also argued that the "trial court failed to recognize its *sua sponte* obligation to inquire into his competency given his strange behavior at trial and sentencing." *Id. at 85, 622 A.2d at 730.* We found no error on the trial court's failure to conduct a competency hearing. *Id. at 87, 622 A.2d at 731.* The record disclosed that Thanos had the present ability to consult with his counsel with a reasonable degree of rational understanding as well as a rational and factual understanding of the proceedings against him. We also rejected his claims related to jury trial and sentencing waiver, stating:

We find no merit in these contentions. Thanos has made no claim that the trial court erred in explaining his right to be tried and sentenced by a jury. In both cases, the trial judge patiently spelled out to Thanos the alternatives and consequences involved in proceeding before a judge rather than a jury. As we noted in *Treece,* a decision need not be wise to be legally "intelligent." All that matters is that Thanos was "made aware of available alternatives and of the advantages and disadvantages of one choice as compared to another." Because Thanos was so informed, his arguments that he did not knowingly waive trial and sentencing by jury, and that the court should have deferred to his counsel's position on the issue of jury trial waiver, are merely extensions of his claims that he was incompetent to stand trial, which is devoid of merit for the reasons discussed in part *II, supra.*

Id. at 94, 622 A.2d at 735 (citations omitted).

As in *Thanos,* Ware's competency to be sentenced by a jury was never raised before the trial court or even during the trial. It is noteworthy that, when questioned by the court, defense counsel explicitly stated that he was *not* suggesting that Appellant was incompetent. The record shows that defense counsel and the trial judge engaged Appellant in a colloquy concerning his election of a jury sentencing, the nature of the decision, Appellant's mental treatment/medical history, his knowledge of the procedure based on *Ware I*, and the absence of any influence of alcohol or drugs. Appellant's mere preference for a jury sentencing is hardly an indication that he was incompetent.

We hold that the trial court did not err in failing to conduct, *sua sponte*, a competency examination. There is nothing in the record to indicate that Appellant lacked the present ability to consult with his attorneys with a reasonable degree of rational understanding or factual understanding of the proceedings. Appellant's decision to proceed with jury sentencing in light of defense counsel's recommendation to the contrary is insufficient in and of itself to trigger a competency examination.

Appellant next argues that, when the trial court learned of Ware's sudden shift in sentencing strategy and defense counsel's self-professed unpreparedness, the trial court was required to conduct a hearing to determine whether counsel could effectively represent Appellant during the sentencing phase and whether this so-called conflict necessitated the withdrawal of counsel. Appellant concludes that it was highly doubtful that Appellant could receive effective assistance of counsel during the sentencing phase. Again, we point out that at no time before the trial court did defense counsel ask to withdraw from representing Appellant.

If Appellant is raising an ineffective assistance of counsel claim, it is more properly raised in post-conviction proceedings. *See Perry v. State, 344 Md. 204, 227-28, 686 A.2d 274, 285 (1996).* Regarding Appellant's claim that the trial court should have inquired into Ware's relationship with his counsel, based on the record before us, we believe that it would have been highly inappropriate for the trial court to have interfered with that relationship at that stage of the proceedings.

Appellant argues that the trial judge's refusal to postpone the sentencing to allow counsel additional time to prepare was an abuse of discretion requiring reversal. It is settled that the decision whether to grant a postponement is within the sound discretion of the trial judge. *See, e.g., Wilson v. State, 345 Md. 437, 451, 693 A.2d 344, 351 (1997); Evans v. State, 304 Md. 487, 514, 499 A.2d 1261, 1275 (1985).* Defense counsel had at least eighteen months to prepare for sentencing; he told the court as much. Appellant never specified, at trial or on appeal, how his sentencing case might have been presented differently if he had had more time. We find no abuse of discretion in denying the postponement.

D. Denial of Motion to Preclude Death Penalty Proceeding

Appellant argues that the trial court erred in denying his motion to preclude the State from seeking the death penalty based on alleged prosecutorial misconduct that resulted in the reversal of his conviction in *Ware I.*[15] Appellant filed

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[15] In *Ware I*, we reversed Ware's conviction and sentence because the prosecution failed to disclose information, as required by *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963),* that the State's witness Edward Anderson had a motion pending at the time of *(cont'd)*

two pre-trial motions addressed to the capital sentencing proceeding: a motion to dismiss the death notice due to prosecutorial misconduct and a motion to bar subsequent prosecution of the case. Both motions were based entirely on the alleged misconduct of the prosecutor before and during Ware's first trial as it relates to Edward Anderson and any State's promise of leniency for his testimony. The trial judge denied the motions, ruling as follows:

As to the motions, the three motions that [defense counsel] argued, the first was the motion to dismiss the death notice due to prosecutorial misconduct, the court denies. As to the motion to bar subsequent prosecution because of prosecutorial misconduct, the court denies. And as to the motion to preclude the testimony of prospective witness Anderson, the court denies that.[16] All of those motions were predicated on prosecutorial misconduct, and if there is to be any sanctions along the lines that the defense is urging, it will have to come from the Appellate Courts, not from this court. So for those reasons, the court denies these motions.

Appellant's argument is two-fold before this Court. He argues that fundamental fairness requires that the State be precluded from again seeking the death penalty. He also argues that Maryland's common law of double jeopardy bars the State from seeking the death penalty. The essence of his argument is that a genuine sanction for serious prosecutorial overreaching is necessary, beyond that of a reversal of the

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trial for reconsideration of his life sentence in an unrelated case. *See Ware I, 348 Md. at 54-55, 702 A.2d at 716.*

[16] Appellant has not appealed the trial court's denial of his motion to exclude Anderson as a witness.

conviction and new trial, to create strong incentive for prosecutors to "play by the rules."[17] Both arguments fail.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution[18] protects against successive prosecution as well as cumulative punishment and is applicable to the States through the Fourteenth Amendment. *See State v. Griffiths, 338 Md. 485, 489, 659 A.2d 876, 878 (1995); Brown v. Ohio, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); Benton v. Maryland, 395 U.S. 784, 793, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).* Even though the Maryland Constitution has no express double jeopardy provision, there is protection against it under Maryland common law. *See Gianiny v. State, 320 Md. 337, 347, 577 A.2d 795, 799 (1990); Pugh v. State, 271 Md. 701, 705, 319 A.2d 542, 544 (1974); State v. Barger, 242 Md. 616, 619, 220 A.2d 304, 306 (1966).*

The aspect of double jeopardy law that we are concerned with in this case is retrial following reversal upon a defendant's successful appeal.[19] A retrial following a

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[17] Appellant has abandoned his trial argument that the court should bar the entire prosecution, addressing his argument in this Court solely to the imposition of the death penalty.

[18] The Double Jeopardy Clause provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[19] In this complex area of jurisprudence, the Supreme Court has said:

> The decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.

Albernaz v. United States, 450 U.S. 333, 343, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).

reversal has always been permitted, *see e.g., Lockhart v. Nelson, 488 U.S. 33, 38, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988); Ball v. United States, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896),* with the exception of a reversal based upon the insufficiency of the evidence. *See United States v. DiFrancesco, 449 U.S. 117, 130, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); Mackall v. State, 283 Md. 100, 113, 387 A.2d 762, 769 (1978); Fields v. State, 96 Md. App. 722, 744, 626 A.2d 1037, 1048 (1993).*

Appellant looks to the mistrial/retrial species of double jeopardy as support for his argument that retrial should be barred as a sanction for prosecutorial misconduct. He seeks not only an application of the principles of *Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982),* but an extension of the principles articulated in that case. *Kennedy* dealt only with the species of federal double jeopardy where a mistrial is declared at the request of the defendant. In the mistrial/retrial situation, the general rule is that the protection against double jeopardy is waived when a defense-requested mistrial is granted, *see United States v. Scott, 437 U.S. 82, 93, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978),* and *Cornish v. State, 272 Md. 312, 318, 322 A.2d 880, 884 (1974),* unless, under the very narrow exception set out in *Kennedy*, the mistrial motion was precipitated by judicial overreaching or deliberate prosecutorial misconduct intended to provoke or goad the defendant into making the motion. In *Kennedy,* the Supreme Court held that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

456 U.S. at 679.

The Court was careful to point out that retrial following reversal on appeal--the situation presented in the instant case--is governed by a different principle. "This Court has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence." *456 U.S. at 676 n.6. Kennedy* provides no support for the proposition that barring capital re-prosecution is an appropriate response to the State's failure to disclose exculpatory evidence in violation of its obligation under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).* Appellant has not identified any case where the United States Supreme Court has extended *Kennedy* to situations where convictions have been reversed on appeal due to prosecutorial misconduct and the retrial has been barred by double jeopardy. The short answer is that the standard announced in *Kennedy* has nothing to do with this case.

Appellant concedes that his capital re-sentencing proceeding was not barred by the Double Jeopardy clause of the United States Constitution. No motion for mistrial based on prosecutorial misconduct was ever made, nor was a mistrial declared. Instead, Appellant was convicted and sentenced to death, followed by a reversal on appeal. He is asking this Court "to mold Maryland's law of double jeopardy under common law principles [to hold that] . . . where as here the State violates the rules in a manner potentially leading to the execution of a human being, the appropriate sanction is to preclude the possibility that the accused will be put to death as a result of a subsequent proceedings in the same case." Appellant's brief at 65. Thus, we must decide whether Maryland common law double jeopardy principles bar a capital re-sentencing proceeding

when the defendant never asked for a mistrial on the ground of prosecutorial misconduct.

Appellant urges this Court to adopt, as a matter of common law, a stricter approach to double jeopardy than that taken in *Kennedy*, in order to sanction prosecutorial misconduct, at least in death penalty cases. To punish a prosecutor for creating grounds for reversal by violating the precepts of *Brady*, however, is not among the purposes of double jeopardy protection. "To require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978).* As we stated in *Tichnell v. State, 297 Md. 432, 440-41, 468 A.2d 1, 5 (1983):*

[Judicial misconduct] is significant for purposes of double jeopardy when a mistrial is declared at the behest of the defendant. . . . When a defendant's trial is completed and his conviction later reversed on appeal, different rules pertain. With some exceptions, the defendant who successfully challenges his conviction may be retried, under the rationale that "the defendant wiped the slate clean and the parties may start anew." *Jones v. State, 288 Md. 618, 625, 420 A.2d 1241, 1244 (1980), cert. denied, 449 U.S. 1115, 101 S. Ct. 928, 66 L. Ed. 2d 845 (1981).*

Cf. Booth v. State, 301 Md. 1, 481 A.2d 505 (1984) (holding that pretrial prosecutorial misconduct does not result in double jeopardy bar unless intentionally calculated to result in mistrial); *Bell v. State, 286 Md. 193, 205-06, 406 A.2d 909, 915-16 (1979)* (holding that, even when prosecutorial misconduct results in mistrial, double jeopardy does not bar

retrial unless misconduct committed intentionally to force mistrial).

Although we do not condone the actions of the prosecutor in *Ware I*, we believe that Appellant was accorded the relief to which he was entitled--reversal of his conviction on appeal. Under the circumstances presented herein, Maryland common law principles of double jeopardy do not bar the State from seeking the death penalty at re-sentencing. We find no error in the trial court's denial of the motion to preclude re-prosecution of the death penalty.

A *Brady* violation has been treated consistently as a "violation of an accused's due process right to a fair trial where the failure undermined confidence in the trial's outcome." *Ex Parte Mitchell, 977 S.W.2d 575, 578 (Tex. Ct. Crim. App. 1997).* The remedy for a *Brady*/due process violation is the reversal of the judgment of conviction and remand of the case for further proceedings, including retrial. *See Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Brady, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194.* We see no sound reason to impart a different standard.

Other state courts similarly have declined to extend state law so as to bar, on double jeopardy grounds, retrials following reversals based on prosecutorial misconduct. *See e.g. Fugitt v. State, 253 Ga. 311, 319 S.E.2d 829, 833-34 (Ga. 1984); State v. Chase, 335 N.W.2d 630, 632 (Iowa 1983); State v. Swartz, 541 N.W.2d 533, 580-81 (Iowa Ct. App. 1995); State v. Sage, 31 Ohio St. 3d 173, 510 N.E.2d 343, 353-54 (Ohio 1987); Ex parte Mitchell, 977 S.W.2d at 580-81.* The same is true for some federal courts. *See e.g. Beringer v. Sheahan, 934 F.2d 110, 114 (7th Cir. 1991)* (holding that a "defendant who did not move for a mistrial on

the basis of intentional prosecutorial misconduct cannot invoke the double jeopardy clause to bar the state from retrying him after his conviction is reversed on that ground"). *But see United States v. Wallach, 979 F.2d 912, 916 (2d Cir. 1992)* (holding that double jeopardy bars retrial after reversal of conviction where there has been intentional prosecutorial misconduct "undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct").[20]

E. The Constitutionality of Maryland's Death Penalty Statute

Appellant argues that Maryland's death penalty statute is unconstitutional. Specifically, he argues that the statute is unconstitutional because the statute (a) requires the defendant to prove mitigating circumstances by a preponderance of the evidence; (b) requires the defendant to establish that non-enumerated mitigating circumstances are mitigating circumstances; and (c) requires a sentence of death where aggravating circumstances outweigh mitigating circumstances by only a preponderance of the evidence. We have addressed these claims over the years and have rejected them. *See Conyers v. State (Conyers II), 354 Md. 132, 198-99, 729 A.2d 910, 945 (1999); Wiggins v. State, 324 Md. 551, 582-83, 597 A.2d 1359, 1374 (1991)* (finding no merit in challenges to defendant's burden regarding statutorily recognized and other mitigating factors or to burden of proof). Appellant presents no arguments that persuade us to reconsider those earlier decisions.

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[20] Ware's claim would fail even under the *Wallach* exception.

F. Determinations Required by Section 414(e)

Although Appellant does not address the issue, we are required by Article 27, 414(e) to make certain determinations regardless of whether any error is assigned. *See Thanos v. State, 330 Md. 77, 97, 622 A.2d 727, 737 (1993).* We make the following determinations:

(1) The sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) The evidence supports the jury's findings of a statutory aggravating circumstance under 413(d); and

(3) The evidence supports the jury's findings that the aggravating circumstances outweigh the mitigating circumstances.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED.

Dissenting Opinion follows:

DISSENT BY: Bell

DISSENT: Dissenting opinion by Bell, C.J.

In this case, acknowledging the continuing validity of *Bohnert v. State, 312 Md. 266, 539 A.2d 657 (1988)*[21] and,

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[21] *Bohnert v. State, 312 Md. 266, 278, 539 A.2d 657, 663 (1988)* makes clear "that a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. Testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law." We also said in Bohnert, "it is ... error for the court to permit to go to the jury a statement, belief, or opinion of another person *(cont'd)*

despite declaring it distinguishable[22] in its application to the facts sub judice, the majority holds that the testimony of Edward Anderson, a critical witness for the State, was inadmissible. Anderson was permitted to testify in front of the jury, the trier of fact, that certain law enforcement officers, i.e., a prosecutor with the Anne Arundel County State's Attorney's office and a police detective, testified at his sentence reduction hearing that "[he] was being truthful in bringing them this information [about] the petitioner's involvement in the murders with which he was charged. The petitioner challenged Anderson's credibility by attempting to prove that the motivation for his testimony was leniency. Thus, the petitioner's cross examination of Anderson concerned Anderson filing a motion for modification of sentence prior to the petitioner's first trial, his bringing to the attention of the sentencing judge that he was a State's witness in the petitioner's trial, and the fact that a prosecutor and a

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to the effect that a witness is telling the truth or lying." *Id. at 277, 539 A.2d at 662.*

[22] In Bohnert, a social worker, testifying as an expert, was allowed to say, based only on the child's statements, that a child was the victim of sexual abuse. We held that testimony invaded the province of the jury because it was in effect a declaration that the child was telling the truth and that the defendant in the case was lying. See *312 Md. at 276, 278-79, 539 A.2d at 662-63.* The majority distinguishes Bohnert and this case, as follows:

> "In Bohnert, the State called a witness before the jury to bolster the credibility of another witness. In this case, we merely have the self-serving statement of the witness saying that others thought he was being truthful. Here we have Anderson basically saying: I am telling you the truth. I am telling you also that two others said I am telling you the truth."

360 Md. 650, 679, 759 A.2d 764, 779, 2000 Md. LEXIS 595, *34 (2000).

police detective involved in the investigation of the murder with which the petitioner was charged were called to testify at Anderson's modification hearing. Consequently, Anderson's testimony in this regard was designed to, and did, bolster his credibility for the jury.

Having determined that Anderson's testimony concerning the prosecutor and the police detective was inadmissible and, thus, that its admission was error, the majority then holds that the error was harmless. It reasons that the distinction it has drawn reduces the prejudicial impact of the evidence. *360 Md. at 679, 759 A.2d at 779, 2000 Md. LEXIS 595,* *34. Then it asserts:

"Anderson made a self-serving statement to the effect that certain persons not present once affirmed, on an unknown basis, his truthfulness in making the statements he again made at trial. Such a statement, by a witness whose credibility is in question, is far less weighty than the expert in Bohnert, and its effect on the jury was likely to be insignificant. Moreover, it is implicit that the police believed Anderson or they would not have gone to bat for him at the hearing on his motion to reduce his sentence."

360 Md. at 714, 759 A.2d at 798, 2000 Md. LEXIS 595, *34-35. I do not agree and, so, dissent.

Once again, I find myself engaged in what sometimes seems like a never-ending battle to protect the integrity and vitality of the harmless error rule. See my dissenting opinions in *Jensen v. State, 355 Md. 692, 718, 736 A.2d 307, 320 (Md. 1999); Evans v. State, 333 Md. 660, 711, 637 A.2d 117, 136 (1994); Bruno v. State, 332 Md. 673, 696, 632 A.2d 1192, 1204 (1993); Rubin v. State, 325 Md. 552, 591, 602 A.2d 677, 696 (1992).* This is so despite the clarity of the statement of the rule in *Dorsey v. State, 276 Md. 638, 350 A.2d 665 (1976),* and the frequency with which it has been

repeated with approval and thus reaffirmed, since. But as this case and those that precede it, to some of which I have just referred, demonstrate, to state the rule accurately is not necessarily to apply it appropriately.

The test of harmless error focuses on the effect of erroneously admitted, or excluded, evidence on the verdict rendered by the jury. As enunciated in Dorsey, the rule is:

"When an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of--whether erroneously admitted or excluded--may have contributed to the rendition of the guilty verdict."

276 Md. at 659, 350 A.2d at 678 (footnote omitted). Once it has been determined that error was committed, reversal is required unless the error did not influence the verdict; the error is harmless only if it did not play any role in the jury's verdict. The reviewing court must exclude that possibility "beyond a reasonable doubt."

Moreover, an appellate court reviewing a trial court verdict must apply the harmless error rule consistently with its role; it should not take on the role of the trier of fact and substitute its judgment for that of the jury or the trial court whose verdict is under review. That would be to usurp the function of the trier of fact and that is not allowed.[23] See,

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[23] There was a time when the Court of Appeals refused to pass upon the question of the sufficiency of evidence to establish the crime with which the accused is charged for the reason that such action would *(cont'd)*

e.g., *Daniels v. State, 24 Md. App. 1, 7, 329 A.2d 712, 716 (1974)* ("We may not usurp the function of the jury by holding that the eyewitnesses should be believed over the alibi evidence."). See also *Shelton v. State, 198 Md. 405, 412, 84 A.2d 76, 80 (1951)* ("This Court will not inquire into or measure the weight of the evidence, and will not reverse the judgment if there is any proper evidence before the jury on which to sustain a conviction."); *Alexander v. Tingle, 181 Md. 464, 467, 30 A.2d 737, 738 (1943)* ("The Court had not the authority to direct the jury that the evidence established a certain fact even though the evidence was uncontradicted and highly persuasive. The Court could not thus usurp the function of the jury to weigh the credibility of the evidence."); *Collins v. State, 14 Md. App. 674, 679, 288 A.2d 221, 224 (1972)* ("The weight of the evidence and the credibility of witnesses are matters within the realm of the jury."); *Wilkins v. State, 11 Md. App. 113, 127, 273 A.2d 236, 243 (1971)* ("The weight of evidence and the credibility of the witnesses [are] for the jury."). In this regard, what I said in dissent in Rubin has relevance here:

"No matter how strong a case for conviction the State may present, even when the defense presents no evidence, the court may not direct a verdict for the State. See Maryland Rule 4-324, which, while providing that a defendant may move for judgment of acquittal, Rule 4-

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usurp the constitutional function of the jury. See, e.g., *Berger v. State, 179 Md. 410, 416-17, 20 A.2d 146, 149 (1941).* At that time, it was well settled that, because, "under the Maryland Constitution, art. 15, sec. 5, the jury are the judges of both the law and the facts in the trial of all criminal cases in the State," "the question of the legal sufficiency of evidence in a criminal case to sustain a conviction is exclusively for the jury to determine." *Id. at 416, 20 A.2d at 149* (citing *Deibert v. State, 150 Md. 687, 695, 133 A. 847, 851 (1926)); Willie v. State, 153 Md. 613, 617, 139 A. 289, 291 (1927).*

324(a), and the court may direct the entry of judgment in his or her favor if there is insufficient evidence, as a matter of law, Rule 4-324(b), makes no provision for the making of a motion for judgment by the State. Compare Maryland Rule 2-519, the civil counterpart. *Lyles v. State, 308 Md. 129, 135, 517 A.2d 761, 764 (1986).* This is so because it is the trier of fact, whether the court or a jury, that must determine if the State has met its burden of proof. To make that determination, the trier of fact is required to find the facts and when, as is usually the case, there are credibility issues, to resolve them. That, in turn, involves weighing the evidence. Appellate courts do not find facts or weigh evidence, 'what evidence to believe, what weight to be given it, and what facts flow from that evidence are for the jury ... to determine.' *Dykes v. State, 319 Md. 206, 224, 571 A.2d 1251, 1260-1 (1990).* See *Gore v. State, 309 Md. 203, 214, 522 A.2d 1338, 1341 (1987); Wilson v. State, 261 Md. 551, 566, 276 A.2d 214, 221 (1971); Jacobs v. State, 238 Md. 648, 650, 210 A.2d 722, 723-4 (1965).* Even when an appellate court assesses the sufficiency of the evidence, it does not weigh it, see *Clemson v. Butler Aviation-Friendship, 266 Md. 666, 671, 296 A.2d 419, 422 (1972); Gray v. Director, Patuxent Institution, 245 Md. 80, 84, 224 A.2d 879, 881 (1966),* it only determines if any evidence exists, on the basis of which a rational trier of fact could find the elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia,*[24]

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[24] In Jackson, the Supreme Court states:

"The sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt (citing *Woodby v. INS, 385 U.S. 276, 17 L. Ed. 2d 362, 87 S. Ct. 483 (1966).*" Instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found

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443 U.S. 307, 319, 99 S. Ct. 2781, 2788, 61 L. Ed. 2d 560, 573 (1979); Bloodsworth v. State, 307 Md. 164, 167, 512 A.2d 1056, 1057 (1986). There is no reason that a harmless error analysis should permit it to do more."

325 Md. at 596-97, 602 A.2d at 698-99.

Citing Dorsey, the majority declares itself "satisfied that there is no reasonable possibility that the evidence complained of ... may have contributed to the rendition of the guilty verdict." *276 Md. at 659, 350 A.2d at 678.* Although mouthing the proper test, its rationale for so concluding belies its proper application. To the majority, it is significant and, indeed obvious, that Anderson's testimony, because Anderson's credibility is in issue, was "far less weighty" when compared with the expert testimony in Bohnert and, more important, "its effect on the jury was likely to be insignificant." In so concluding, rather than determining whether the evidence likely, or could have, influenced the jury verdict, the majority places itself in the shoes of the jury and, in that posture, determines the weight that it would give the evidence, attributing that weight to the jury that decided the case. Thus, rather than apply the Dorsey test, it applies the test as explained in *Ross v. State, 276 Md. 664, 674, 350 A.2d 680, 686-7 (1976).* In so doing, the majority expands the harmless error rule in a manner that is both unwarranted and unsupportable.

As I explained in Rubin,

"The essence of this test is the determination whether the cumulative effect of the properly admitted evidence so

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the essential elements of the crime beyond a reasonable doubt (citing *Johnson v. Louisiana, 406 U.S. 356, 32 L. Ed. 2d 152, 92 S. Ct. 1620 (1972)).*"

outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded (quoting *Ross, 276 Md. at 674, 350 A.2d at 686-7).*

"Thus excising the evidence admitted in error, and focusing on what remains, it concludes that a reasonable doubt simply could not have been generated from that evidence. Under that formulation, the test for harmless error is: whether, excluding the offending evidence, that which remains is sufficient to sustain the conviction and/or is, in fact, such that the case for conviction is "overwhelming." It requires, in addition to the threshold determination of sufficiency, that an appellant court weigh the evidence. So, the majority reasons, where the evidence is sufficient to convict and it is also strong enough to meet its definition of "overwhelming," only one verdict, guilty, is possible, as a matter of law; hence, that evidence cannot generate a reasonable doubt.

"Although the Ross formulation of the test has been stated in subsequent cases, see *Trusty v. State, 308 Md. 658, 668-69, 521 A.2d 749, 754 (1987),* and even applied, see *Mills v. State, 310 Md. 33, 48-49, 527 A.2d 3, 10 (1987)* (dicta), I have found no case which has provided a reasoned justification for it. It is significant, I think, that the error in Ross was held not to be harmless and that a factor influencing that holding was that the case was tried by a jury. *276 Md. at 674, 350 A.2d at 686-7.* See also *State v. Fuller, 308 Md. 547, 554, 520 A.2d 1315, 1318 (1987)* (where trier of fact considered erroneously submitted evidence, case remanded to determine if, without that evidence trier of fact would reach same conclusion). In any event, that approach, in my opinion, is contrary to the role of an appellant court."

Rubin, 325 Md. at 595-96, 602 A.2d at 698 (Bell, J. dissenting). Furthermore, applying the harmless error rule as the majority does fails to recognize that the harmless error inquiry is not simply a sufficiency of the evidence inquiry, although when the exclusion of the evidence erroneously admitted results in an insufficiency of the evidence to convict, the error can never be harmless. To be sure, such an inquiry is required to be made whenever there is a reversal of a conviction on appeal, its function is to determine if a new trial is required, not, except as indicated above, to determine if the error is sufficiently egregious to warrant reversal of the conviction. Moreover, because it is the trier of fact, in this case, the jury, and not an appellate court, that must find the facts and resolve credibility issues,

> what appears, on the cold record, to be an insurmountable case for the State, when viewed from the jury's perspective, having seen it unfold through live witnesses, in the dramatic atmosphere of the courtroom may be quite a close case or result in a defense verdict. How, or why, a jury may decide to resolve credibility or fact issues in a particular manner is a matter only it knows. One thing is certain, the jury is under no obligation to decide any case consistently with what is, objectively, the strongest case.

Rubin, 325 Md. at 593, 602 A.2d at 697 (Bell, J. dissenting). Furthermore, harmless error is the exception to the general rule; it was never intended to be the general rule. In that regard, we have said that the test of harmless error "has been and should be carefully circumscribed." *Younie v. State, 272 Md. 233, 248, 322 A.2d 211, 219 (1974).* And the continuing validity of the majority's harmless error analysis

makes what was said in *People v. Jablonski, 38 Mich. App. 33, 195 N.W.2d 777, 780 (1972):*

> Continued expansion of the harmless error rule will merely encourage prosecutors to get such testimony in, since they know that, they have a strong case, such testimony will not be considered to be reversible error, yet if they have a weak case, they will use such testimony to buttress the case to gain a conviction and then hope that the issue is not raised on appeal,

more significant and a matter of concern.

Acceptance of the distinction the majority draws between Bohnert and the instant case does not warrant a different result with regard to the harmless error analysis. It may well be that the quality of the testimony of a witness seeking to buttress his own credibility is less than that of a witness deemed to be independent, testifying as an expert. I might also agree that the effect of the latter on the jury might be greater. Neither of these propositions answers the issue in this case, however. There can be a disparity in the quality of the testimony and in impact and yet the testimony of both could, and, I submit, probably would, affect the jury's verdict. Who knows what factors guide the resolution of credibility issues by individual jurors? That respected members of the law enforcement community attest to the witness' truthfulness likely will be viewed by the jury as important and worthy of credit. The source of the testimony, i.e., Anderson, may well be, or, in this case, could have been considered by the jury to be, less important than the fact that was the substance of that testimony, i.e., a prosecutor and a police detective believed what Anderson had to say about the

petitioner's involvement in the crime with which the petitioner was charged.

APPENDIX E

DARRIS ALARIC WARE,	*	IN THE
	*	
Petitioner,	*	CIRCUIT COURT
	*	
v.	*	FOR
	*	
STATE OF MARYLAND,	*	ANNE ARUNDEL COUNTY
	*	
Respondent.	*	Case No.: K-98-1096

* * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

This case was before the Court on Petitioner Darris Alaric Ware's Petition for Post-Conviction Relief. For the reasons stated herein, the Court will grant in part and deny in part the petition.

Facts

Mr. Ware was previously tried in 1995 in the Circuit Court for Howard County where he was sentenced to death for two counts for first degree murder. The Court of Appeals of

Maryland reversed Mr. Ware's convictions. Ware v. State, 348 Md. 19 (1997). On July 19, 1999, after a second trial in the case in the Circuit Court for Anne Arundel County, a jury found Mr. Ware guilty of two counts of first degree murder and two counts of use of a handgun in the commission of a felony. On July 22, 1999, a capital jury entered a determination of death on each of the first degree murder convictions. On August 13, 1999, Mr. Ware was sentenced to death on both convictions of first degree murder, ten years on each of the handgun counts, to run consecutively, and the aggregate twenty years to run consecutively to the death sentences.

Mr. Ware's Motion for New Trial, filed on August 13, 1999, was denied. Mr. Ware appealed the Anne Arundel County decision to the Court of Appeals of Maryland where his convictions and sentences were affirmed. Ware v. State, 360 Md. 650 (2000). Mr. Ware also filed a writ of certiorari to the United States Supreme Court on November 17, 2000, which was denied on January 16, 2001. Mr. Ware seeks post conviction relief from this Court.

Standard of Review

Md. Ann. Code Art. 27 §645A encompasses the Post Conviction Procedure Act which governs the petition and hearing for post conviction relief. The purpose of the Post Conviction Procedure Act is "to consolidate into one statutory procedure all of the remedies previously available for collaterally challenging the validity of a criminal conviction or sentence." Barr v. State, 101 Md. App. 681 (1994); Jones v. State, 114 Md. App. 471 (1997). It provides a remedy for contesting the legality of conviction and incarceration, based upon the allegation that the judgment was imposed either (a) in violation of the Constitution of the United States and of the Constitution or laws of this State, or

(b) that the court was without jurisdiction to impose the sentence, or (c) that the sentence exceeds the maximum authorized by law, or (d) that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coran nobis, or other common law statutory remedy. Creswell v. Director, Patuxent Institution, 2 Md. App. 142 (1967). In order for a Petitioner to be entitled to relief under the Act his petition must be "(1)...substantially cognizable under the act and (2) not [have] been previously or finally litigated or waived..." Pfoff v. State, 85 Md. App. 296 (1991).

Pursuant to Art. 27 § 645A(b),[1] any allegation of error that has been finally litigated may not be relitigated by a post conviction petition. If the Court of Appeals or the Court of Special Appeals has rendered a decision on the merits of a case, an allegation of error will be deemed finally litigated. Hunt v. State, 345 Md. 122, 165 (1997).

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[1] *When allegation of error deemed to be finally litigated.*

For the purpose of this subtitle, an allegation of error shall be deemed to be finally litigated when an appellate court of the State has rendered a decision on the merits thereof, either upon direct appeal or upon any consideration of an application for leave to appeal filed pursuant to, § 645-I of this subtitle; or when a court of original jurisdiction, after a full and fair hearing, has rendered a decision on the merits thereof upon a petition for a writ of habeas corpus or a writ of error coram nobis, unless said decision upon the merits of such petition is clearly erroneous.

Article 27, § 645A(c)[2] provides that if a petitioner had a prior opportunity, e.g., trial, direct appeal, or prior post conviction to raise a particular allegation and did not do so the allegation is waived. Curtis v. State, 37 Md. App. 459 (1977). In Cirincione v. State, 119 Md. App. 471 (1998), the Court held that when the allegation is based on a fundamental right, there must be a knowing and intelligent relinquishment by the petitioner for a waiver to have occurred. If the allegation is based on a non-fundamental right then the court shall apply traditional waiver rules and look to see if the petitioner had an opportunity to raise the issue but did not. If the petitioner can show special circumstances why he did not raise the issue, the court may excuse the waiver.

Discussion

I. Whether Mr. Ware received ineffective assistance of trial counsel during pretrial phase of his case?

Mr. Ware alleges his trial counsel failed to provide him with effective assistance of counsel, citing several bases for this allegation. Generally, Mr. Ware contends that his

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[2] *When allegation of error is deemed to have been waived. (1) For the purpose of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not the petitioner actually took part in the appeal), in an application for leave to appeal a conviction based on a guilty plea, in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be on the petitioner.*

attorney violated his Sixth Amendment right in that his trial counsel prevented him from having a fair trial.

Strickland v. Washington, 466 U.S. 668, 686 (1984) provides a two prong test to determine whether counsel's assistance was so faulty that it "undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." The first of the two prongs requires that the Petitioner demonstrate that the counsel's performance fell below an objection standard of reasonableness. Id. at 687. The second prong requires the Petitioner to show that the deficient performance prejudiced the Petitioner's case so as to deny the petitioner of his Constitutionally guaranteed right. Id. At 688.

A. Whether Mr. Ware received ineffective assistance of counsel when trial counsel failed to move to bar a death penalty sentencing proceeding on the grounds of collateral estoppel form of double jeopardy based upon a juror's factual finding in Ware I that a "two life sentences are adequate"?[3]

In the 1995 Ware case, a juror listed as a non-statutory mitigating factor that "two life sentences are adequate." Ware argues that the State was collaterally estopped from re-litigating that mitigator in the 1999 Ware case because the juror's determination was an ultimate decision of fact.

Generally the principal of collateral estoppel holds that a finding of ultimate fact once litigated and decided in favor of a party cannot later be relitigated adversely to that party.

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[3] This issue corresponds to the Post Conviction Petition filed at oral arguments, April 29, 2002, Paragraph 11.A.i.

Cook v. State, 281 Md. 665, 669 (1978). The United States Supreme Court has held that collateral estoppel "applies irrespective of whether the jury considered all relevant evidence and irrespective of the good faith of the State in bringing successive prosecution." Harris v. Washington, 404 U.S. 55, 56-57 (1971). However, collateral estoppel applies only when the ruling upon which it is based was either itself a final judgment or was rendered in a proceeding that culminated in a final judgment. Morgan v. Morgan, 68 Md. App. 85 (1986).

In the case *sub judice*, Mr. Ware claims that the State should be estopped in the 1999 Ware case from relitigating an issue of fact determined in the 1995 Ware case. The difficulty with applying collateral estoppel is that the verdict in the 1995 case was vacated and the trial began anew. Arguably, then, without a final judgment, Ware cannot now argue collateral estoppel. However, the courts have recognized cases in which the case may be ongoing, but issues within the case have been finally determined.

One Maryland case relied upon the Restatement 2d of Judgments on the issue of collateral estoppel, which states that in some instances the prior decision at issue is final for the purpose of issue preclusion, whether or not the end judgment is final. In order to make such a determination, that the issue may be finally decided even where the case has not been finally concluded, the Court must consider whether

> the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court

> supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion. The test of finality, however, is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision.

Morgan, 68 Md. App. at 93, quoting Restatement 2d of Judgments.

The courts have noted that the application of collateral estoppel in criminal cases is "not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." Ashe v. Swenson, 397 U.S. 436, 444 (1970). The determination of whether an issue has been finally decided, even if the case is still ongoing requires a court to

> examine the record of prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

Id., *quoting* Sealfon v. United States, 332 U.S. 575, 579 (1947).

Thus, in the case *sub judice*, the Court must make its determinations with a careful study of the record, including the pleadings, evidence, and other relevant matter. Post-Conviction Ware Exhibit 3, the Official Findings and Sentencing Determination as to Count I-Betina Krista Gentry, does demonstrate on the record factual findings by the jury. Among them was that one or more, but fewer than all twelve members of the jury concluded that "two life sentences are adequate to protect society. Death is not necessary." The Court of Appeals reversed the first Ware case, however, and allowed a new trial. In the context of the sentencing phase, then, this does not constitute a final decision to be binding on the 1999 Ware case.

B. Whether Mr. Ware received ineffective assistance of counsel when trial counsel failed to renew Petitioner's motion to strike the jury panel or conduct additional voir dire in light of the pre-trial publicity?[4]

Mr. Ware alleges that trial counsel failed to object when the trial court instructed the jury to avoid all media and information about the case, and asked if anyone had a problem putting such outside information out of their minds. Mr. Ware contends that the court should have granted his earlier motion to strike the panel or re-voir dired those jurors that may have been exposed to the pre-trial article in the Capital and/or Maryland Gazette newspapers. Four of eighteen venire panel members, not specifically voir dired on this issue, qualified for the jury and actually sat on the jury during the guilt/innocence and sentencing phases of the trial.

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[4] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 11.A.i. and ii.

The trial judge is given the responsibility on impaneling a fair and impartial jury; to that end, he or she has broad discretion in conducting voir dire. One of the main functions of the process is to determine juror bias; thus, the judge is in the best position to make credibility findings which on appeal must be upheld as the appellate court cannot discern bias from an appellate record. Wainwright v. Witt, 469 U.S. 412, 429 (1985). Thus, the trial judge controls the jury selection process. For example, the trial court decides the scope and the form of the questions propounded. Burch v. State, 346 Md. 253, 293 (1997).

In the case *sub judice*, the trial was the subject of an article in the Capital and Maryland Gazette newspapers which detailed the double murder case, and the fact that the case had been previously tried in another county, where the defendant was found guilty of murder and sentenced to death. Upon questioning the venire members, the trial court asked if anyone would have difficulty putting outside information in considering the merits of Ware's case.

Maryland case law makes clear that the voir dire process is within the discretion of the trial judge. Although the law places a significance on the defendant's right to a fair and impartial jury, the actual voir dire process is limited while still allowing goals of justice to be met. The Court concludes that the trial judge sufficiently questioned the prospective jurors regarding any potential bias resulting from the pre-trial publicity. As no juror answered in the affirmative, there was no reason to grant the requested relief.

Mr. Ware's petition alleges that trial counsel erred in not renewing his motion to strike the panel or to conduct additional voir dire. The court has long upheld the tactial trial decisions of counsel, as the trial counsel is in the best position to view what is beneficial in their case. This is true

particularly when the defendant is fully informed and acquiesces to his counsel's decision.

Given the conclusion of this Court, as stated above, the trial court made its decision, there was no need to renew any motion in order to preserve objection. Moreover, the fact that trial counsel did not object would not result in any error affording Mr. Ware relief; the trial judge had discretion to preside over the voir dire process, and he did so in this case. This Court notes that it may been have been more correct to voir dire the panel members individually or collectively, in a different manner, but even if we assume Petitioner sufficiently demonstrates the first prong of Strickland, he has not satisfied the second prong.

C. Whether Mr. Ware received ineffective assistance of counsel when trial counsel failed to advise the Court of its mistake in not giving the requested instruction on separate consideration of counts?[5]

Mr. Ware had requested that the trial court instruct the jury as to the separate consideration of the two separate counts of murder and the two separate counts of possession of a handgun. Mr. Ware now argues that he is entitled to post conviction relief because the Court mistakenly left that specific instruction out although the Court indicated it had been incorporated into the jury instructions.

Mr. Ware further contends that the failure of trial counsel to object to the court's instructions prejudiced him in that his theory of the case required the jury to consider the two

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[5] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 11.A.iii.

counts separately, as he attempted to show that the murder of one of the victims was second degree murder.

The transcript of the proceedings reveals that the judge did not give an instruction on the separate consideration of counts.[6] Further, the transcript shows that trial counsel did raise the question to the judge as to whether the instruction on the separation of counts had been given. When the Court responded "it is in there," trial counsel did not pursue the issue.[7]

Even assuming trial counsel's failure to pursue the matter rises to the ineffective assistance of counsel, the trial judge, in essence did provide enough instruction to constitute an instruction on consideration of separate counts by giving the jury two separate Determination and Sentencing sheets. Accordingly, even if the Court were to find a violation of the first prong of Strickland, there has not bee a sufficient showing to satisfy the second prong as to this issue.

D. Whether Mr. Ware received ineffective assistance of counsel when trial counsel failed to object during the guilt/innocence phase, that evidence of other crimes be excluded pursuant to 5-404(b) during the testimony of Adrian Washington and William, Jones, Jr.[8]

Mr. Ware contends his trial counsel erred in not objecting to the admission of testimony from two State's witnesses,

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[6] See Post Conviction Ware Exhibit 1 H, pp 57-58.

[7] See Post Conviction Ware Exhibit 1 H, p. 59.

[8] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 11.A.iv.

Adrian Washington, and William Jones, Jr. under Maryland Rule 5-404(b), other crimes evidence, instead of objecting on the basis of relevancy; both testified that they saw Mr. Ware with a gun prior to the murders.

Maryland Rule 5-404(b) holds that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme, or plan, knowledge, identity, or absence of mistake or accident.

Mr. Ware argues in his petition that the testimony from these two witnesses gave an account which would have constituted a violation of the law against wearing, carrying or transporting a gun pursuant to Article 27, 36 B. First, the simple fact that the two witnesses claimed to have seen Mr. Ware with a gun prior to the murders does not constitute evidence of other crimes or bad acts; the witnesses clearly did not state that carrying a handgun was a violation of the criminal code. Second, even if it were such evidence, it could fall under the exception for admissibility for purposes of showing a plan, opportunity, or intent. As such, the Court cannot find that Mr. Ware's trial counsel's failure to object on the basis of Maryland Rule 5-404(b) proved to be ineffective assistance of counsel under the first prong of the Strickland.

E. Whether Mr. Ware received ineffective assistance of counsel when trial counsel failed to seek a cautionary instruction under Maryland

Rule 5-105 when witness Edward Anderson bolstered his own credibility?[9]

Mr. Ware contends that Mr. Anderson improperly bolstered his testimony when he testified that law enforcement officials considered his testimony truthful during his modification hearing. Although Mr. Ware's trial counsel did object to the testimony, the objection was overruled, according to Mr. Ware. Mr. Ware's petition seeks relief based upon his trial counsel's failure to seek a cautionary instruction for the Court.

Maryland Rule ~~5-105,~~ upon which Mr. Ware bases his claim, states

> When evidence is admitted that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Based upon this rule, Petitioner may have sufficiently demonstrated that trial counsel was ineffective in failing to ask for a cautionary instruction after his objection to the witness bolstering his own credibility during his testimony was overruled. However, again, any deficient performance does not rise to the level to deny Mr. Ware his constitutionally guaranteed right to counsel.

F. Whether Mr. Ware received ineffective assistance of counsel when trial counsel failed to impeach Witness Edward Anderson's testimony

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[9] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 11.A.v.

on cross examination with evidence of a prior burglary conviction?[10]

Mr. Ware argues that his trial counsel ineffectively attacked Mr. Anderson's credibility during cross-examination in that he failed to impeach his testimony with a prior burglary conviction.

Maryland Rule 5-609 allows for impeachment by use of evidence of a crime.

Specifically, the rule provides,

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

A burglary has been held by Maryland to be an infamous crime. See generally, Banc v. State, 73 Md. App. 135 (1987); Johnson v. State, 38 Md. App. 100 (1977).

Mr. Ware argues that trial counsel erred in not impeaching Mr. Anderson. Maryland courts, however, have long upheld the tactical considerations and decisions of a

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[10] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 11.A.vi.

trial attorney. See e.g. Hunt v. State, 345 Md. 122 (1997) ("Tactical decisions, when made by an authorized competent attorney, as well as legitimate procedural requirements, will normally bind a criminal defendant. Most decisions as to trial tactics, strategy and procedural maneuvers rest with the defendant's attorney."; Oken v. State, 343 Md. 256 (1996) *citing*, State v. Colvin, 314 Md. 1, 22 (1988) ("The decision to interpose objections during trial is one of tactics and trial strategy.").

Thus, the fact that Mr. Ware's trial counsel did not effectively attack one of the State's witness's testimony, does not necessarily make it error on his part. Moreover, Mr. Ware has not addressed the issue of the prejudice it caused to his case. Without more, this cannot be a basis for post conviction relief.[11]

G. Whether Mr. Ware received ineffective assistance of counsel when trial counsel failed to object to inadmissible hearsay from the husband of the victim, Cynthia Allen?[12]

Mr. Ware seeks post conviction relief based upon the allegation that his trial counsel did not object when the husband of the victim testified to a conversation he overhead between his wife, and the other murder victim. Specifically, he testified that the other murder victim, his wife's friend, had said that Mr. Ware hit and bruised her on the same day that the killing occurred.

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[11] Mr. Anderson was questioned by trial counsel about his criminal record otherwise but not as to this specific burglary charge.

[12] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 11.A.vii.

It appears clear that the statement would be hearsay, but Md. Rule 5-803(b)(1)[13], (2)[14], or (3)[15] may apply, as a hearsay exception, depending upon the circumstances surrounding the statement overheard by the husband. According to the facts, the alleged attack on the victim occurred the same day of the murder, and there was a bruise.

Even if this testimony merited an objection from Mr. Ware's counsel, a decision not object is difficult to second guess, after the fact. Furthermore, even if Mr. Ware could show ineffective assistance of counsel on this issue, he has not sufficiently demonstrated that this issue alone meets the prejudice requirement of Strickland.

II. Whether Petitioner received ineffective assistance of appellate counsel?[16]

A. Whether Petitioner received ineffective assistance of counsel when appellate counsel

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[13] Present sense impression. A statement describing or explaining an even or condition made while the declarant was perceiving the event of condition, or immediately thereafter.

[14] Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

[15] Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition...offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

[16] The Stickland standard applies to appellate counsel just as with trial counsel in determining ineffective assistance of counsel.

failed to raise the issue of the trial court's erroneous ruling on motion to strike venire panel or re-voir dire previously qualified jurors on appeal in the 1995 Ware case?[17]

Appellate counsel's responsibility includes selecting the most promising issues to pursue on the appeal to the appellate court. In fact, courts give great deference to appellate counsel in making this determination. "The decision whether to raise an issue on appeal is quintessentially a tactical decision of counsel." Oken v. State, 343 Md. 256, 271 (1996). On appeal, an attorney does not have to advance every possible argument supported by the trial record. Appellate counsel commits error only when ignoring issues that are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. State v. Gross, 134 Md. App. 528, 562 (1999), *citing*, Gray v. Greer, 800 F.2d 644, 646 (1986).

B. Whether Petitioner received ineffective assistance of counsel when appellate counsel failed to raise on appeal the issues of Officer Michael Praley's testimony regarding Mr. Ware's silence and of the requested instruction for separate consideration, both of which were preserved for appeal?[18]

Mr. Ware argues that his appellate counsel should have argued on appeal the issue of the officer's testimony regarding Mr. Ware's selective silence when interviewed

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[17] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 11.B.i.

[18] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 11.B.ii and iii.

immediately after the murders. Mr. Ware notes that his trial counsel did object to admissibility of such testimony. Similarly, Mr. Ware argues that appellate counsel erred in not raising the preserved error on the requested separate consideration instruction.

Although Maryland law allows appellate counsel discretion in making the decision of which errors to bring forth on appeal, not raising this issue on appeal gives the Court great concern. The Court finds the issue of the Officer's testimony regarding Ware's selective silence during his interrogation as a compelling issue on appeal, particularly since the error had been preserved by trial counsel.

III. Whether Petitioner received ineffective assistance of counsel with regard to sentencing?

A. Whether Petitioner received ineffective assistance of counsel with regard to sentencing when his trial counsel was not prepared for the capital sentencing phase of the trial, and did not present substantial mitigation evidence by not using as a live witness before the jury, Lorrie James, a mitigation specialist who had interviewed several witnesses, and not requesting a youthful age mitigator?[19]

Mr. Ware alleges that trial counsel was ineffective because he was unprepared for the capital sentencing phase of the trial. First, Mr. Ware contends that his trial counsel expected him to elect a judge sentencing, so he was

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[19] These issues correspond to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraphs 12.A.i, ii, iii.

unprepared when he chose to be sentenced by a jury. Although his trial counsel sought postponement, the request was denied. Second, Mr. Ware maintains that the failure to present the sole expert witness for the defense, a social worker and mitigation specialist as a live witness instead of by video deposition, prejudiced his case. Third, Mr. Ware's trial counsel did not request any specific sentencing instructions. Particularly, Mr. Ware asserts that a youthful age instruction would have been appropriate as it was a statutory mitigator.

At the post conviction hearing, trial counsel testified that they had not been prepared for the sentencing phase of trial before the jury and thus could not present the above mitigation evidence. Trial counsel testified that at all times they expected that the sentencing phase would be before the court. The State's Attorney, in his argument to this Court during the post conviction hearing, acknowledged error by trial counsel given the lack of preparedness for sentencing; in fact, when questioned by the Court as to the second prong of Strickland, the State's Attorney deferred the issue of prejudice for the Court's ruling rather than denying its effect. The Court concludes that these errors prejudiced Mr. Ware's sentencing phase such as to deny Mr. Ware his constitutionally guaranteed right to counsel.

B. Whether Petitioner received ineffective assistance of counsel during the sentencing phase when trial counsel failed to object to the State's opening and closing arguments?[20]

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[20] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 12.A.iv.

Mr. Ware argues that trial counsel failed to object during the sentencing phase of trial when the State, in opening statement and closing argument, argued to the jury that when it considered the existence of mitigation evidence, that it should consider victim impact evidence. As such, Mr. Ware contends that the State's argument improperly biased the jury's consideration of the existence of mitigation evidence.

Because the Court will grant Petitioner relief with regard to the sentencing phase based on the issues of trial counsel's lack of preparedness, it will not address this claim more specifically.

IV. Whether Petitioner was denied due process of law based on the indictment and sentencing proceeding?

A. Whether Petitioner was denied due process of law because the grand jury was not presented with an indictment charging Petitioner as a principal in the first degree in the murders?[21]

Mr. Ware argues that the grand jury was not presented with an indictment charging him as a principal in the first degree in the murders. Mr. Ware relies upon Apprendi v. New Jersey, 530 U.S. 466 (2000) to support his argument. Apprendi holds that the due process clause of the Fifth Amendment of the United States Constitution guarantees any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Mr. Ware has waived this argument by not objecting prior to or during trial.

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[21] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 13.A.

B. Whether Petitioner was denied due process of law when the jury applied a preponderance of the evidence standard instead of the required beyond a reasonable doubt standard?[22]

Mr. Ware contends that the jury applied the wrong standard in sentencing because in reaching a verdict of death, they applied a preponderance of evidence standard. Mr. Ware argues that the proper standard is beyond a reasonable doubt.

Maryland law holds that mitigating circumstances must be proven by a preponderance of the evidence. Baker v. State, 367 Md. 648 (2002); Bruce v. State, 328 Md. 594 (1992). Thus, the proper standard is preponderance of the evidence. Further, Maryland courts have considered whether Apprendi invalidates the Maryland death penalty statute, and they have held that it does not. See Baker v. State, 367 Md. 648 (2002) (In order for the holding in *Apprendi* to control, there would need to be a penalty enhancement at the sentencing proceeding beyond the maximum sentence provided for by statute.)

Because the Court will grant Petitioner relief with regards to the sentencing phase, the Court will not more specifically consider the arguments under Subsection IV.A. and IV.B.

---

[22] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 13.B.

C. Whether Petitioner was denied due process of law when the State created a false impression of material facts?[23]

Mr. Ware asserts that the State created a false impression of material facts when during a motions hearing on July 6, 1999, it was suggested that the State's witness, Mr. Anderson, was in danger because of his cooperation in this case, when in reality the risk was caused by conduct unrelated to this case. Mr. Ware alleges that this hindered any effective cross-examination of Mr. Anderson. Further the State had representatives testify at Mr. Anderson's modification of sentence hearing, which resulted in a reduction of his sentence from life to thirty five years. Again, Mr. Ware maintains that the State effectively had an agreement with Mr. Anderson but left a false impression.

With regards to any type of agreement between the State and Mr. Anderson, when the State's case is based, in part, if not in large part, upon the testimony of Mr. Anderson, a key witness to establish its case, witness credibility becomes a significant issue. Thus, courts require that evidence of any understanding or agreement as to a future prosecution be disclosed. Wilson v. State, 363 Md. 333 (2001). After closely reviewing this issue, the Court finds no prosecutorial misconduct in its review of the pertinent transcripts.

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[23] This issue corresponds to Petitioner's April 29, 2002 Petition for Post Conviction Relief, Paragraph 14.A.

CONCLUSION

For the reasons stated herein, the Court will grant in part and deny in part Mr. Ware's Petition for Post Conviction Relief as follows:

1. As to the trial on the guilt/innocence phase, even assuming that error under the first prong of Strickland had been sufficiently demonstrated, the Court is not convinced that the second prong is met. Even assuming counsel error occurred in the aggregate, the Court is still not convinced.

2. As to the sentencing phase, the Court finds that trial counsel's performance was ineffective assistance of Counsel for several reasons as noted above; further, the Court finds that prejudice to Mr. Ware's case was sufficiently shown such as to have effectively denied Mr. Ware his constitutionally guaranteed right to counsel in the sentencing phase. Even if one or another of the claims under the sentencing prong alone as not sufficient to meet Strickland's second prong, together they rise to such a level in the aggregate as to have denied Mr. Ware his constitutional right to counsel. Therefore, the Court will grant Petitioner a re-sentencing hearing.

3. As to the ineffectiveness of appellate counsel, the Court will allow a belated appeal as to the issue under II.B. discussed on pages 14 and 15 of this memorandum.

DARRIS ALARIC WARE,	*	IN THE
	*	
Petitioner,	*	CIRCUIT COURT
	*	
v.	*	FOR
	*	
STATE OF MARYLAND,	*	ANNE ARUNDEL COUNTY
	*	
Respondent.	*	Case No.: K-98-1096

* * * * * * * * * * * * * * *

ORDER

Upon consideration of the arguments set forth in the Petition for Post Conviction relief, and the response thereto, the evidence presented and oral arguments made at the hearings on April 29 and 30, 2002, and June 13, 2002, and for the reasons stated on the record at the hearing and as set forth in the Memorandum Opinion filed simultaneously herewith, it is this 28th day of June, 2002 by the Circuit Court for Anne Arundel County,

ORDERED that the Petition for Post Conviction Relief on behalf of Mr. Darris Alaric Ware is granted in part and

denied in part as more specifically set forth in the Memorandum Opinion.

Robert H. Heller, Jr., Judge

Circuit Court for Anne Arundel County

cc:

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DARRIS ALARIC WARE	*	IN THE
	*	
Petitioner	*	CIRCUIT COURT
	*	
vs.	*	FOR
	*	
STATE OF MARYLAND	*	ANNE ARUNDEL COUNTY
	*	
Respondent	*	Case No.: K-1998-1096

* * * * * * * * * * * * * * *

AMENDMENT TO MEMORANDUM OPINION

The Memorandum Opinion, filed June 28, 2002, is hereby amended as follows:

> **Footnote #18 on page 14 of the Memorandum Opinion should read as follows:**
>
> **18 These issues correspond to Petitioner's April 29, 2002 Petition For Post Conviction Relief, Paragraph 11.B.ii and iii.**
>
> **Further, paragraph B on page 19 of the Memorandum Opinion was intended to provide for a belated appeal on the issue of selective silence only and not on the instruction for**

separate consideration although this issue was also identified in paragraph B.

All other provisions of the Memorandum Opinion as filed on June 28, 2002 shall remain unchanged.

Robert H. Heller, Jr.

Dated: June 28, 2002

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APPENDIX F

STATE of Maryland v. Darris Alaric WARE.

No. 50 Sept. Term 2001

COURT OF APPEALS OF MARYLAND

April 22, 2002, Decided

DECISION WITHOUT PUBLISHED OPINION

JUDGES: Submitted before BELL, C.J., ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL and BATTAGLIA, JJ.

OPINION:

ORDER

The Court having considered the State's application for leave to appeal from the grant of post conviction relief in a capital case, Darris Ware's application for leave to appeal, and the answers filed thereto, in the above-entitled case, it is this 22nd day of August, 2002,

ORDERED, by the Court of Appeals of Maryland, that both applications be, and they are hereby, DENIED, and it is further

ORDERED, that, as to the belated appeal ordered by the Circuit Court on the single issue of whether Darris Ware had received ineffective assistance of appellate counsel, consideration of that appeal is deferred pending the new sentencing proceeding, and the belated appeal will be

considered with the appeal, if any, from the decision in the sentencing hearing.

APPENDIX G

United States Constitution, Amendment V

U.S. CONST. amend. V provides: "No person shall…be compelled in any criminal case to be a witness against himself."

APPENDIX H

Q Okay. He told me further that he owned a .380 gun, a handgun. He described it as black grips with a silver frame.

Q Did he tell you where that gun was?

A He told me that he kept at his apartment. The apartment, being his, would be described the one he was staying in over on Village Squares with Antonio Barnes.

Q And did he tell you that – did he say anything about its whereabouts on December 30th?

A The gun?

Q Yes.

A No.

Q Did you ask him where you could find the gun?

A It was asked. I didn't get a response.

Q Okay. What else did he tell you?

MR. WARREN: Your Honor, can we approach for a minute?

THE COURT: Yes.

(Whereupon , a Bench Conference followed:)

Mr. Warren: With respect to the interrogation, I think that the only thing that is admissible are the answers that the officer asked and the responses he gets. If there is no response, that should not be admissible, his post-Miranda ---

THE COURT: What is the theory for that?

MR. WARREN: Well, there is no answer.

THE COURT: I mean, --- have a question and then --- what is the Officer supposed to say?

MR. WARREN: Well, he shouldn't be allowed to testify. He should only be allowed to testify to those answers that he got – those questions that he got responses to. If he didn't get a response, he shouldn't be able to testify.

THE COURT: No. No. No. The point of him testifying --- exercise his right to remain silent. But he has given up that right to remain silent.

MR. WARREN: Which he can invoke at any time.

THE COURT: And you --- because he chooses not to answer a damning question, that he is now re-invoking his silence?

MR. WARREN: I think my concern is that the answer could be inferred that somehow the failure to answer was somehow – one might – yes. It could be interpreted that way. It could be interpreted as an invocation of Defendant. The answer could be interpreted as an invocation of Defendant.

THE COURT: Well, I have no indication that he has now – chooses not to speak to the officer.

MR. WARREN: You have him not answering, Your Honor.

THE COURT: Yes. Not answering one question. Did he answer any further questions?

MR. WARREN: Two questions.

THE COURT: All right. Two questions.

MR. WARREN: ---

THE COURT: Did he answer any other questions?

MS. ROGERS: No. I believe that was the one that he did not respond to.

THE COURT: I know. But did he, the officer, ask him any other questions after this?

MS. ROGERS: Yes.

MR. WARREN: That he got answers from?

MS. ROGERS: Yes.

MR. WARREN: Okay.

THE COURT: I will leave the answer stand.

MR. WARREN: Okay.

(Whereupon, the Bench Conference was concluded.)

* * * * * * * * * *

CROSS-EXAMINATION

BY MR. WARREN:

Q Mr. Anderson, first of all, I want to ask you about the offense for which you are serving time for now. You indicated that you are serving a life sentence for first degree murder?

A Yes. Felony murder.

Q Okay. And when you were arrested on that case, the police indicated to you that they wanted to talk to you. Is that correct?

A Yes, sir.

Q And you agreed to talk to them. Correct?

A Yes, sir.

Q Voluntarily?

A Yes, sir.

Q And you gave a number of written statements to them. Is that true?

A Yes, sir.

Q Okay. I want to talk to you first about the first written statement you gave. When you gave the first written statement, it was your representation that you were going to be telling them the truth. Is that correct?

A No. I fabricated.

Q Okay. But before you – well, we know you lied, but I am saying before you actually gave the written statement that was a lie, you led them to believe you were going to tell them the truth about what happened. Is that fair to say?

A I would assume.

Q Well, I am asking you what was – did you do that when you gave them the statement? Did you lead them to believe you were going to tell them the truth?

A I just told them – I just told them to persevere myself. I was – everybody was trying to save theyself. I was saving myself.

Q Oh, you were trying to save yourself. Oh, okay. Was that a yes?

A Yes, sir.

Q So, in order to save yourself, you told them you weren't even there when the murder for which you are now serving time was committed?

A Yes, Sir.

Q But they didn't believe that, did they?

MS. ROGERS: Objection.

MR. WARREN: I'll withdraw it.

THE COURT: I am going to sustain that.

MR. WARREN: I will withdraw it.

BY MR. WARREN:

Q But you lied to them? That was a lie, wasn't it?

A Yes, I told you I created that story.

Q They came back again and asked you to give them another written statement. Correct?

A Yes.

Q So you offered to give them a second written statement. Right?

A Yes.

Q You lied in the second written statement, didn't you?

A Yes.

Q And then you finally gave them a third statement. Correct?

A Yes.

Q In that third statement you said, well, I planned the robbery, but I didn't know it was going to be a murder. Isn't that what you told them?

A Yes.

Q Now, I am also going to ask you a little bit more about the status of the murder case that you are serving time for now. You filed a motion for modification in the case, haven't you?

A It was filed.

Q Okay. Well, I am going to ask you the legalese. It is your desire to have some of your time reduced. Would that be fair to say?

A Yes.

Q You want something less than life?

A Yes.

Q Okay. And have had hearings in front of the Judge who sentenced you asking him to consider giving you something less than life haven't you?

A Yes.

Q And in the course of those hearings you have brought to the Judge's attention the fact that you provided testimony in this case, didn't you?

A Yes.

Q And you wanted him to consider that in making a determination. Isn't that true?

A Well, that's the strategy that my lawyer chose. Yes.

Q Okay. That was your lawyer's strategy?

A Yes.

Q Did you disagree with it?

A No. I did not.

Q And I just have one other area that I want to cover with you. Back on December 30th of 1993 you said that you and Christie were just friends?

A Yes.

Q You weren't – I know you were in jail, but you weren't trying to pursue a romantic relationship with her, were you?

A To dispel the romantic notion, Christie had a relationship with my brother.

Q I am just asking you the question. Were you trying to – no. It is a yes or no question. Were you trying to pursue a romantic relationship with her? It is a yes or no question.

A No.

Q You began talking to her by telephone beginning the middle of November. Is that right?

A I believe so.

Q Okay. You talked to her at least five or six times?

A I believe so.

Q Before the 30th of December, 1993?

A Yes.

Q She came to visit you once?

A Yes.

Q Well, you saw the letter. You have identified the letter that you sent to her. Correct?

A Yes.

Q Okay. Do you remember the contents of that letter? Do you want to take a moment to look at it to refresh your recollection, because I am going to ask you some questions about specific statements that you made, and I want you to have a – I will lean on the side of caution. I will let you have it. And if you need it, you can look at it.

Okay. For the record, State's Exhibit 5 there is only writing on the front portion of the letter. On State's Exhibit 6 there is writing on the front and the back. Is that correct?

A Yes, sir.

Q Okay, I want to ask you some specific questions about what you said in that letter.

First of all, would it be fair to say that in this letter there was some parts of this letter which refer to prior conversations you had with Christie?

A No. I took it upon myself to ask these questions.

Q You took upon yourself to ask these questions?

A Yes.

Q Okay. Maybe you don't understand my question. There are certain portions of that letter that indicate that you and Christie have talked about subjects prior to you actually putting this information in the letter; certain subjects that you and Christie have discussed. That would probably be page two.

If you want me to direct your attention to it, I will. I can direct your attention to one portion of it. There is more than one, but ...

"The most previous phone conversation that we had?"

A Uh-huh.

Q So you are referring in that letter to conversations you have had with Christie before the date you wrote this letter. Correct?

A Yes.

Q Okay. Now, starting with the first page of the letter, you say that Christie was younger than you?

A Yes.

Q And that you actually met her through your brother? Or, she was in your brother's grade?

A Yes.

Q And you remember testifying before that you used to call her Little Christie?

A Yes.

Q And you indicate in this letter she doesn't hold that title anymore; she is not Little Christie to you anymore.

A No.

Q You don't remember saying that?

A Yes. I remember saying that.

Q Okay. So you did put it in the letter?

A Yes.

Q Okay. You also put in the letter, "Not only for the facts of your physical attributes, but also for the facts of your attitude and views on life."?

A Yes.

Q That is why she wasn't Little Christie to you?

A Right.

Q It wasn't just her mind, it was her physical attributes as well?

A That's right.

Q Okay.

MR. WARREN: The Court's indulgence for a moment.

(Pause.)

BY MR. WARREN:

Q You then begin to refer to what we have discussed a little bit already, the previous phone conversation that you had that you found to be intriguing.

A Uh-huh.

Q Isn't that what you say in the letter?

A Yes.

Q And you say, "You were kind of reluctant to touch upon it because of the – I guess that word is profundity, profundities of the conversation? Is that what you said?

A Yes.

Q "But you could never opt such an opportunity because life is too short."

A Yes.

Q And you really would like to truthfully know how long she has been entertaining thought she expressed to you? That is what you ask her?

A Yes.

Q And specifically, these thoughts dealt with the conversation that you had with her that you indicate she expressed these thoughts to you? Having your children?

A Yes.

Q Living with you?

A Yes.

Q What it would be like to marry you?

A Yes.

Q You asked her did she actually give those things a lot of thought or were they just spontaneous to the conversation. Didn't you ask her that?

A Of course.

Q And you said you wanted to close with those thoughts because those were the thoughts that your heart pondered?

A Yes.

Q Then, after the body of the letter, there is like a P.S., a postscript where you ask her a lot of questions. Correct?

A Yes.

Q And I am not going to go over all of them. The ladies and gentlemen of the jury will have this to examine it. You ask her – question number three, "What are the qualities that you look for in a man?"

A Yes.

Q You ask her, "Tell me one thing about yourself that you never told anyone else."

A Yes.

Q You ask her, "What do you resent in your male friends?"

A Yes.

Q And you ask her, "What is love and what does love mean to you as a person?"

A Yes.

Q And you and Christie were just friends?

A Yes.

MR. WARREN: The court's indulgence.

(Pause.)

MR. WARREN: I don't have anything else.

* * * * * * * * * * *

...Where is the Defendant's gun on December 30th after he is arrested?

Mr. Gunning told you, in his opening statement, that his client is innocent. Completely innocent. Well, ladies and gentlemen, where is the innocent man's gun? The police asked him that very question, and he doesn't answer.

The police searched his Jeep. It is not there. The police looked behind the speaker in his apartment. In fact, they looked everywhere in his apartment, and that gun is nowhere to be found, ladies and gentlemen.

There is only one reason that the Defendant's gun is nowhere to be found after these murders, and it is not a coincidence. The Defendant used his .380 Davis handgun to

murder Christie and Cynthia and then got rid of the murder weapon so that he wouldn't be tied to the murders he had just committed.

He believes, in his mind, at that point he has gotten rid of the only witness and the weapon.